

1 IN THE UNITED STATES DISTRICT COURT

2 IN AND FOR THE DISTRICT OF DELAWARE

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4 ATELIERS DE LA HAUTE-GARONNE (French : CIVIL ACTION  
Corporation) and F2C2 SYSTEMS S.A.S. :  
5 (French Corporation), :

6 Plaintiffs, :

7 v. :

8 BROETJE AUTOMATION-USA INC. (Delaware :  
Corporation), BROETJE AUTOMATION GMBH :  
9 (German Corporation), :

: NO. 09-598-LPS

10 Defendants.

11 - - -

12 Wilmington, Delaware  
Wednesday, April 9, 2014  
13 *Jury Trial - Volume C*

14 - - -

15 BEFORE: HONORABLE **LEONARD P. STARK**, U.S.D.C.J., and a jury

16 APPEARANCES:

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JAMES L. HIGGINS, ESQ.

19 and

20 KAYE SCHOLER, LLP  
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23 P R O C E E D I N G S

24 (REPORTER'S NOTE: Jury trial proceedings were  
25 held in open court, beginning at 8:30 a.m.)

1 THE COURT: Good morning, everyone.

2 (The attorneys respond, "Good morning, Your  
3 Honor.")

4 THE COURT: Issues from the plaintiff this  
5 morning?

6 MR. HOROWITZ: Yes, Your Honor. We have a  
7 couple.

8 MR. LINDVALL: Yes, Your Honor.

9 MR. HOROWITZ: Mr. Lindvall will start.

10 THE COURT: Okay.

11 MR. LINDVALL: I will be brief. There is really  
12 two, a couple global issues. One issue is with several of  
13 their witnesses, their expert witness and a couple of their  
14 lay witnesses, they have documents, they have prior art,  
15 U.S. patents, patent applications, what you have. And we  
16 don't have any problem with their witnesses testifying about  
17 it and even reading statements of the prior art in the  
18 record, but we don't think they should be admitted as  
19 evidence because they're hearsay, and under the hearsay  
20 rule, 803(18), the Lerner treatise rule says to the extent  
21 called to the attention of an expert witness upon  
22 cross-examination, or relied upon expert witness in direct  
23 examination, statements contained in published treatment  
24 tease, periodicals, pamphlets, subject to history, medicine  
25 or other science or art, establishes a reliable authority --

1 and we're not challenging him on reliable authority or  
2 not -- by the testimony or admission of the witness or by  
3 other expert testimony, judicial notice. And it says that  
4 can be allowed in under the hearsay exception.

5 But it says the last sentence says: If  
6 admitted, the statements made be read into evidence but not  
7 be received as exhibits.

8 And what we're saying is that the exhibits we  
9 don't have a problem with the exhibits themselves being  
10 used, published to the jury, and statements read from them  
11 but we do have a problem with them being admitted as  
12 exhibits.

13 THE COURT: This is the prior art they're  
14 relying on to invalidate the patents?

15 MR. LINDVALL: Yes, Your Honor.

16 THE COURT: I have never hard this argument  
17 before. Do you have any authority that has ruled this way?

18 MR. LINDVALL: The only authority we looked at,  
19 I can, all I can say honestly is that other courts I have  
20 been before have ruled that way an kept the prior art out.

21 THE COURT: Okay.

22 MR. LINDVALL: And there is --

23 THE COURT: Do you have --

24 MR. LINDVALL: Do you want to do that first,  
25 hear from them first?

1 THE COURT: Let's hear all of them.

2 MR. LINDVALL: Okay. There is one last one.

3 There is an exhibit for Mr. Neugebauer. It's DTX-1943. And  
4 what we have here is a document that was created fairly  
5 recently. It's a compilation of fault reports. And each  
6 document is a separate document that was sent or may have  
7 been sent or some documents don't even show that they have  
8 been sent.

9 So it's a compilation put together in some way  
10 but it doesn't seem to make sense. A lot of them don't have  
11 dates. They have a merged date, it looks like a printout  
12 from a database. Others don't have any indication that they  
13 were sent anywhere. It looks like it's an internal  
14 database. So it's a compilation that was created, it looks  
15 like it was created for litigation not in the ordinary  
16 course of business. And we're objecting to that based on  
17 that. I have no problem if they want to introduce the  
18 individual documents in there, and we won't object to them,  
19 but I have a problem with them trying to bring in a whole  
20 set of basically correspondence under one exhibit. And this  
21 is DTX-1943.

22 Your Honor, that is all we have.

23 THE COURT: Okay. Thank you. I'll hear from --

24 MR. LINDVALL: I'm sorry. I just --

25 MR. HOROWITZ: I'll do mine.

1 THE COURT: We'll cut it at Mr. Lindvall's  
2 issues for now and we'll hear defendants response to those  
3 two.

4 MR. KELLEHER: Good morning, Your Honor.

5 THE COURT: Good morning.

6 MR. KELLEHER: First, concerning the idea that  
7 prior art references should be considered as hearsay. I'm  
8 also not very familiar with the idea. I think there is two  
9 conceptual problems with looking at prior art references as  
10 hearsay.

11 First of all is that in a patent case you look  
12 at the prior art references to see what they disclose, what  
13 is on the page. You are not really looking for the truth  
14 of the matter asserted, merely what it says. Even if they  
15 were offered for the truth, Your Honor, they're ancient  
16 documents. Every single one of them is more than 20 years  
17 old.

18 THE COURT: And that would be an exception to  
19 the hearsay rule?

20 MR. KELLEHER: That's right. 803(16) I think.

21 THE COURT: Okay. What about the Neugebauer?

22 MR. KELLEHER: Mr. Neugebauer is a compilation  
23 that we put together. Over about three years or so, my  
24 client sent 54, 55 fault reports to F2C2. And in our  
25 business records, we found and produced several chunks that

1 are consecutive. I think it's 1 to 23 in one place and  
2 another chunk someplace else, but nowhere did we find one  
3 set of all of them together.

4 So what we did is we did put together and mark  
5 as an exhibit here a list, a consecutive set of all the ones  
6 we could find. I think there two missing. And the author  
7 of the vast majority of them, Mr. Neugebauer is going to be  
8 here to testify and authenticate what they are, and we think  
9 it would be helpful for the jury to have one set of the  
10 consecutive order to look through if they want to.

11 THE COURT: Why admit that into evidence as  
12 opposed to just make it a demonstrative?

13 MR. KELLEHER: We have the actual person, Your  
14 Honor, who can identify what all of the documents are. We  
15 are using several of them on formally admitting them into  
16 evidence, but it could give the jury a full record of the  
17 relationship between the parties, should they choose to flip  
18 through the document.

19 THE COURT: I'm sorry. Are all 55 approximately  
20 of the underlying fault reports going to come into evidence?

21 MR. KELLEHER: We were only going to use fewer  
22 than ten as direct exhibits with the witnesses, Your Honor.

23 THE COURT: Do you have this exhibit here? Do  
24 you have a copy of it?

25 MR. KELLEHER: Yes, Your Honor.

1 THE COURT: May I see it, please?

2 MR. LINDVALL: Here is one.

3 MR. KELLEHER: May I approach, Your Honor?

4 THE COURT: Yes. Thank you.

5 (Document passed forward.)

6 THE COURT: Mr. Kelleher, these are a series of  
7 individual fault reports?

8 MR. KELLEHER: They are, Your Honor. There are  
9 a few that were sent on the same day but it is a series.

10 THE COURT: And what will Mr. Neugebauer  
11 essentially represent about these?

12 MR. KELLEHER: He will represent that these were  
13 reports of actual problems that existed either as customers  
14 at Boeing or at the Broetje facility during the construction  
15 of the machines. Customers, that they were sent as well.

16 THE COURT: And that some, if not many, are from  
17 him but not all of them?

18 MR. KELLEHER: It is true that not all of them,  
19 Your Honor, are, though he was very often the project  
20 manager on the projects for which they were sent.

21 THE COURT: What will he say about the ones that  
22 he was not the author of?

23 MR. KELLEHER: Your Honor, I cannot represent  
24 with 100 percent accuracy, but I think he would be able to  
25 testify with regard to each one of them that he knew it was



1 sent.

2 THE COURT: Okay. Is there anything else?

3 MR. KELLEHER: No, Your Honor.

4 THE COURT: Mr. Lindvall, you can reply if you  
5 want.

6 MR. LINDVALL: Two quick replies. The  
7 statements of ancient documents, it's 803(16), says  
8 statements of a document in existence 20 years or more, the  
9 authenticity establishes. So it allows the statement of the  
10 document to get in, not the document itself.

11 Now let me quickly address Mr. Neugebauer.

12 THE COURT: What about they're not really being  
13 offered for the truth of the matter asserted, they're really  
14 just being offered to what was said in the report?

15 MR. LINDVALL: I believe they are being offered  
16 as evidence that is already out there. This has already  
17 been discovered. So you'd have to obviously offer it for  
18 the truth of the matter asserted if the experts are relying  
19 on it to say, okay, it was out there. And the jury has to  
20 rely on it to be the truth of the matter asserted.  
21 Otherwise, it's not any good from the standpoint of being  
22 used for prior art.

23 With Mr. Neugebauer, if you looked at the  
24 exhibit, Your Honor, especially in the end, there is  
25 actually like internal charts or reports which we can't

1 figure out at all. There is no indication they were sent to  
2 anybody, and that is our problem we have. It's a collection.

3 THE COURT: Give me an example of what you are  
4 talking about. I haven't seen them.

5 MR. LINDVALL: Unfortunately, I gave you mine.

6 THE COURT: Oh. You can have this back.

7 MR. LINDVALL: Thank you.

8 (Document passed back.)

9 MR. LINDVALL: For example --

10 THE COURT: They're showing it on the screen,  
11 too. So we should be able to see it.

12 MR. LINDVALL: Will you put up, for example,  
13 DTX-1943.56, please? There is a number of these. And there  
14 is no indication here that these were actually sent to  
15 anyone. There is no indication of the facts or anything  
16 like that.

17 You know, to tell you the truth, we looked at  
18 those and we have even talked with Mr. Bornes. He has never  
19 seen this style anymore, and there is a whole load of these.  
20 And we have other ones.

21 For example, the issue we have, we have no  
22 problems with these individually going in so they can lay  
23 the foundation, but to get everything in through this -- let  
24 me give you another example.

25 If you can turn to 1943.10. In this one, for

1 example, Your Honor, if you look at the date, this is all we  
2 have here (indicating). And there is no fax header or  
3 anything like that to indicate it was sent.

4 Now, they do have something that clearly has it,  
5 but what they're trying to do we believe is that they have a  
6 load of documents, some which I think we would actually have  
7 no objection to but some we would have an objection to, and  
8 to try to get it in as one exhibit and avoid all these  
9 objections or maybe just get a sample of these and then get  
10 the whole compilation in we believe is unfair.

11 THE COURT: All right. For the record, on page  
12 10, you pointed me to the top of the telefax which seems to  
13 have some sort of maybe metadata but no actual date. But I  
14 see down further in the actual fault reports it says date  
15 18/06/11. Do you have any reason to doubt that that is the  
16 date?

17 MR. LINDVALL: I don't know, Your Honor. I  
18 don't know what the witness would say.

19 THE COURT: All right.

20 MR. LINDVALL: That may be the date of the fault  
21 report or something like that, but I don't know if the date  
22 was actually sent to, the document was sent to Dr. Bornes.  
23 The other documents, there is a whole list of these ones  
24 which look like internal documents that have no indication  
25 that they were ever sent.

1                   THE COURT: All right. Mr. Kelleher, let me get  
2                   you back up here.

3                   As Mr. Kelleher is are coming back up, you are  
4                   going to get overruled, the objection with respect to the  
5                   prior art.

6                   First off, as I say, that is not an objection I  
7                   have ever heard before. And I think if there is authority  
8                   for it, I would have hoped I would have heard of it by now  
9                   or hear it today.

10                  I think it's probably right that the prior art  
11                  is not actually, strictly speaking, being offered for the  
12                  truth of the matter asserted but simply to show what was out  
13                  there and known or believed by one of ordinary skill in the  
14                  art at the time.

15                  But in any event, I'm confident that there is  
16                  sufficient reliability that what is stated in the prior art  
17                  is relied on by one of skill in the art such that I don't  
18                  believe the hearsay objection is meritorious. So that one  
19                  is overruled.

20                  But on these Neugebauer exhibits, if you would  
21                  address these last points about some of them look like  
22                  charts that maybe Mr. Bornes never saw.

23                  MR. KELLEHER: Right. Pardon me, Your Honor.  
24                  For many of these, you may notice, you may not have noticed,  
25                  but when we assembled this, we pulled fault reports from

1     their document production if we could find it. We pulled  
2     the default reports from our document production if we  
3     couldn't find an AHG Bates label because there is a mix. I  
4     don't want the Court to not understand that.

5             For the ones that you can't obviously tell they  
6     were sent because there is a fax number on it, it's just how  
7     Broetje kept their record of it back in the time period of  
8     2001 where they did the scanning technology. There is  
9     Wikipedia or something. Some of them would be printed out  
10    for the database, perhaps not signed, that sort of thing.  
11    I think Mr. Neugebauer will testify about that.

12            THE COURT: All right. But he is in substance  
13    going to explain as best as he knows these documents were  
14    all sent to somebody at AHG?

15            MR. KELLEHER: I think so, Your Honor. I can't  
16    say I'm 100 percent sure.

17            THE COURT: Why not make you go through it  
18    document by document and we see what he says and the ones he  
19    can authenticate will come in and the ones he won't, we  
20    won't?

21            MR. KELLEHER: I can do that, Your Honor.

22            THE COURT: All right. Let's do that then.

23            MR. KELLEHER: Understood.

24            THE COURT: Is there anything else? There is I  
25    think for plaintiffs.

1 MR. HOROWITZ: Good morning, Your Honor.

2 THE COURT: Good morning.

3 MR. HOROWITZ: Dr. Budach is scheduled to  
4 testified either later today, if we get to it, or perhaps  
5 tomorrow. Dr. Budach is an internal German patent attorney  
6 at clause, the mother company of Broetje.

7 Defendants are relying on Dr. Budach's opinion  
8 in this case which is an e-mail written in September of 2005  
9 with respect to the German litigation that was beginning at  
10 that time.

11 Last night, at 9:27 p.m. for the very first time  
12 we were sent this demonstrative slide.

13 About an hour later, we were sent the next  
14 demonstrative slide.

15 That's an expert witness slide, expert opinion  
16 slide. Nowhere in Dr. Budach's prior e-mail opinion of  
17 September 2005 does any of this appear. Not one word of it  
18 appears in there.

19 THE COURT: Does he reference these three prior  
20 art references?

21 MR. HOROWITZ: Absolutely not. It's not in  
22 there. It's not in there. This is an attempt, it's a clear  
23 attempt at the 11th hour.

24 First of all, we're supposed to get  
25 demonstratives at 7:00 p.m. I'm not going to scream and

1 yell about that, but at 11:00 o'clock at night to get what  
2 amounts to expert opinion with diagrams comparing the United  
3 States patent which he never offered an opinion about, he is  
4 not a United States patent attorney, he is not an expert in  
5 United States patent law and showing these pictures, and  
6 then discussing some of the claims, some of the claim  
7 language above, it's not appropriate.

8 This violates Rule 26. He is here to testify  
9 by the way as a fact witness as to what he did and didn't do  
10 with respect to proffering evidence as to the company, 2003,  
11 2004, 2005, even the redesign. He is a fact witness.

12 THE COURT: And you have deposed him?

13 MR. HOROWITZ: Yes. In fact, may I show you a  
14 brief clip? Because one of the things he said about his  
15 2005 e-mail opinion I think you should see in relationship  
16 to this.

17 THE COURT: Sure.

18 "Question: But this -- the family that you have  
19 shown here, this is something that was created on September  
20 8, 2005; is that correct?

21 "Answer: Yes, September 2005.

22 "Question: Okay. And was this created to  
23 assist you in your Exhibit 160, which is dated September 8,  
24 2005 also?

25 "Answer: Yes.

1                   "Question: Other than the opinion you show  
2 here on Exhibit 160, were there any other opinions relating  
3 to either the infringement or validity of the AHG European  
4 patent 0 373 685?

5                   "And to clarify, I mean written opinions.

6                   "Answer: I'm assuming that I didn't prepare  
7 any other written opinions because we were already in the  
8 preparation phases of the German infringement proceeding  
9 and there were external attorneys involved."

10                  MR. LINDVALL: This was not in that opinion. He  
11 expressly testified that he had no other opinions. And  
12 the night before he is scheduled to testify, literally the  
13 night before, at 10:30 at night, we get that slide, which is  
14 clearly an attempt to offer an expert opinion. We don't  
15 think he should be allowed to use it.

16                  THE COURT: Let's hear what defendants have to  
17 say.

18                  MR. KELLEHER: First of all, a few factual  
19 issues. Dr. Budach's advice was given in 2003. The client  
20 followed up with him in 2005 to double check his opinion  
21 after there was an accusation of infringement. That is the  
22 2005 e-mail that is being referred to. His advice did cover  
23 the U.S. patent. That is shown in writing in the 2003  
24 opinion. And, lastly, the fact that he is not a U.S.  
25 attorney doesn't matter after he may see it.



1           Your Honor, what this is, he is a fact witness,  
2           not an expert witness. Things get a little strange when you  
3           have an advice-of-counsel defense in a case.

4           He is not offered under Rule 26 as an expert but  
5           he is someone who is giving opinions, in a sense, because it  
6           bears on the state of mind of my client.

7           What this is, it is a demonstrative that  
8           explains what was in his mind for why he gave the opinion  
9           that there were no -- I am sorry, my clients' tube doesn't  
10          have any grooves, there is not going to be infringement.  
11          And part of his reason for believing that was looking at the  
12          prior art, the Shinjo patent that is disclosed in the body  
13          of the patent, figuring that it can't be what's in the prior  
14          art. It has to be something new and nonobvious.

15          So this demonstrates what was in his mind when  
16          he gave the opinion of counsel that my client should adopt  
17          the soft pentagon because it wouldn't infringe the AHG  
18          patent that is shown in the middle. That is what this is.

19          He is a fact witness. It is a demonstrative to  
20          help explain his testimony. They used demonstratives to  
21          help explain the testimony of the fact witness Mr. Bornes  
22          and fact witness Mr. Hage yesterday.

23          THE COURT: So the substance of his testimony is  
24          going to be, he is going acknowledge he didn't write any of  
25          this down in 2003 or 2005?

1 MR. KELLEHER: He actually did make a reference  
2 to the prior art I believe in the 2005 e-mail. This is what  
3 was in his mind.

4 THE COURT: Is he going to testify that he wrote  
5 something down about Shinjo?

6 MR. KELLEHER: Perhaps only in his notes, Your  
7 Honor. I don't know the exact answer to that question.

8 THE COURT: Were those notes produced?

9 MR. KELLEHER: When we waived the privilege, we  
10 disclosed everything that he did.

11 THE COURT: You did?

12 MR. KELLEHER: Yes.

13 THE COURT: He is going to say, essentially,  
14 that this is what was in his mind and led him to give an  
15 opinion to his client that there was neither infringement  
16 nor invalidity under the U.S. -- there was neither  
17 infringement nor a valid patent, including the U.S. patent.

18 MR. KELLEHER: The opinion, Your Honor, is  
19 really one of noninfringement, that this shape would not be  
20 covered by AHG's patents because that is the best  
21 interpretation of that patent, because otherwise it would be  
22 invalid because it would be covered by the prior art  
23 discovered in the patent.

24 Really, it is a noninfringement opinion.

25 THE COURT: So his opinion isn't going to be

1       that this U.S. patent in front of us is invalid, it's just  
2       that I thought it would be invalid if it covered the  
3       defendants' products.

4               MR. KELLEHER: He might believe it's invalid,  
5       Your Honor. But that is not the opinion that he is going to  
6       give.

7               THE COURT: What about the fact that this  
8       demonstrative came in pretty late, perhaps as late as 11:00  
9       p.m. past night?

10              MR. KELLEHER: I don't think it was as late as  
11       11. It was a little bit late. Both sides, Your Honor, have  
12       missed a number of deadlines in the case. We haven't made a  
13       peep about it.

14              This is the first time you have heard anyone  
15       complain about missed deadlines. We also have  
16       demonstratives to produce for our technical expert, which I  
17       think was a 60- or 70-slide deck, and we had only one person  
18       working on it. We are working to get all these out as  
19       quickly as we can.

20              THE COURT: Thank you. Mr. Horowitz, you can  
21       respond.

22              MR. HOROWITZ: There is nothing in the 2003  
23       document that they are referring to and now at trial trying  
24       to claim is when their opinion was given. There is nothing  
25       about validity in there. They can represent to you that

1     this isn't about validity, but look at the bottom of the  
2     diagram. It says "invalidity."

3             THE COURT: Right. But if he is going to say,  
4     In my head I concluded that this patent would be invalid if  
5     it were broad enough to cover my clients' product, you don't  
6     have any objection to him saying that if that's what his  
7     testimony is. Correct?

8             MR. HOROWITZ: I don't think he should be  
9     allowed to use what I consider to be a very prejudicial  
10    document with the jury with these pictures and offer what  
11    would amount to a second bite at the apple as an expert when  
12    he didn't see it contemporaneously at the time. There is no  
13    document that Mr. Kelleher could point you to that says any  
14    of this. There is nothing about Shinjo -- he did provide  
15    written documents. Two. In 2003 he wrote a document. In  
16    2005 he wrote a document. None of this is in there. It is  
17    simply not there.

18            THE COURT: I don't think this will be the last  
19    time we hear this today or tomorrow. But you are losing me  
20    on why -- if the man is going to get up there and say, yeah,  
21    I never wrote it down but it was in my head, is there  
22    anything objectionable about that testimony?

23            MR. KELLEHER: I guess he could give that  
24    testimony. I don't think he should be allowed to give it  
25    with respect to this document.

1           THE COURT: If this accurately illustrates the  
2 testimony he is going to give, and granted, I think you will  
3 have some powerful cross-examination, fine, but doesn't this  
4 illustrate the testimony that we are being told he is going  
5 to give reflects what was in his head?

6           MR. HOROWITZ: I think the document itself, even  
7 understanding the nexus -- I understand your question.  
8 First of all, I think the document itself is prejudicial. I  
9 think he is going to say he is not giving an invalidity  
10 opinion, if Mr. Kelleher is representing that correctly.  
11 But it says "invalidity." He didn't provide an invalidity  
12 opinion at the time. Here, they are suddenly, magically,  
13 the night before trial they have a new expert opinion that  
14 offers an invalidity opinion.

15           It is procedurally inappropriate, even if  
16 demonstratively it would be okay, because it illustrates his  
17 testimony. This is expert opinion that is appearing in this  
18 case for the very first time the night before trial. That's  
19 why it's inappropriate.

20           THE COURT: I am going to overrule the  
21 objection. I understand the concern. But I am told that  
22 the man is going to testify that in his head in 2003 and/or  
23 2005, thoughts about Shinjo and about this patent covered my  
24 product, then it's so broad it's invalid, either on direct  
25 or cross, I am confident it will be established, there is

1 nothing in writing evidently to support that, that is fair  
2 grounds for cross-examination. If the testimony is going to  
3 come in, as I am told it will, on direct, then this  
4 demonstrative is consistent with that.

5 While there may be prejudice to it, I think it's  
6 not an improper demonstrative, based upon what I am told the  
7 testimony will be.

8 Any other issues from plaintiff?

9 MR. Horowitz: No, Your Honor, thank you.

10 THE COURT: Issues from defendant?

11 MR. KELLEHER: Your Honor, just something for  
12 the record. We a few days ago had designated to play some  
13 of the deposition testimony of Mr. Bornes. Plaintiffs  
14 rightfully objected that he is not a party or officer of a  
15 current party. And he is present. And they thought we  
16 would call him live. We were willing to do that.  
17 Apparently, Mr. Bornes is really under the weather. They  
18 said they would no longer object to us playing his testimony  
19 by deposition. They have the designations. And it is our  
20 plan to go forward, assuming there is no objection.

21 MR. HOROWITZ: There is no objection.

22 THE COURT: Sorry to hear that, Mr. Bornes.

23 Anything else?

24 MR. KELLEHER: That is all.

25 THE COURT: We did get the jury instructions and

1 verdict sheet. Let's plan to talk about those at the end of  
2 the trial day today. So whoever is going to be arguing  
3 those and answering my questions, make sure you are  
4 available at 4:30 today.

5 We will take a recess and come back for the  
6 jury.

7 (Brief recess taken.)

8 \* \* \*

9 (Proceedings reconvened.)

10 THE COURT: Bring the jury in.

11 MR. LINDVALL: Your Honor, one thing for the  
12 record, please --

13 THE COURT: Sure.

14 MR. LINDVALL: -- that I inadvertently  
15 particularly forgot.

16 We just want to note Mr. Lawrence's slides. We  
17 forgot. Just make, on the record, the Farnan rule I guess  
18 we started calling it, which you referred to in your  
19 pretrial conference with his slides 2, 3, 4, 49, 50, 51,  
20 with respect to those slides. We object to them just to  
21 preserve our right to object to them on that. Thank you.

22 THE COURT: The objection as beyond the scope of  
23 the expert report is noted.

24 MR. LINDVALL: Yes, Your Honor.

25 THE COURT: Is there anything else before we

Ellis - direct

1 bring in the jury?

2 MR. LINDVALL: No, Your Honor.

3 THE COURT: No, okay. Let's bring the jury in.

4 (Jury returned.)

5 THE COURT: Good morning, everyone.

6 A JUROR: Good morning.

7 THE COURT: We are prepared to proceed. We'll

8 bring Mr. Ellis I think it was back to the stand.

9 ... DOUGLAS ELLIS, having been previously duly  
10 sworn, retook the stand and testified further as follows ...

11 THE COURT: Welcome back, Mr. Ellis. I remind  
12 you that you remain under oath.

13 You may proceed.

14 DIRECT EXAMINATION (Continued)

15 BY MS. SHARP:

16 Q. Good morning, Mr. Ellis.

17 A. Good morning.

18 Q. Do you still have in front of you the notebook of  
19 exhibits that we handed you yesterday?

20 A. It looks the same to me, yes.

21 MS. SHARP: So if we can start with slide 113.

22 BY MS. SHARP:

23 Q. I had hoped when we broke yesterday that we had  
24 completed our discussion of the patent infringement damages  
25 but as I reviewed my notes and as you shared with me, I



Ellis - direct

1 skipped over a slide pretty quickly. So I would ask that we  
2 go back to slide 111.

3 A. Yes.

4 Q. To put this back in context, we were discussing the  
5 Panduit factors; is that correct?

6 A. That's right.

7 Q. I think I may have cut you off a bit on the marketing  
8 proposition, so let me ask you what your conclusions are  
9 with respect to AHG marketing capacity to make the sales  
10 that Broetje made?

11 A. Yes. My conclusion was that they did have marketing  
12 capacity. They did direct marketing, as we've heard  
13 earlier. They also utilized pole marketing which is  
14 customers requesting AHG's product and then people coming  
15 to buy from them. And then, of course, the deal they had  
16 with Broetje.

17 Q. And can you give us some examples of the customers  
18 that Broetje was selling to in the United States in that  
19 time period?

20 A. Yes. It would be Boeing, Spirit, Vought. Those  
21 types of customers.

22 Q. Any other names that you can think of?

23 A. Not off the top of my head.

24 Q. Now turning to slide 118, have we now completed the  
25 discussion of patent infringement damages?

Ellis - direct

1 A. Yes.

2 Q. Turning next to the damages for the other claims.

3 What is your understanding of the other claims  
4 in this case?

5 A. The other claims as I understand it relate to  
6 copying, so the benefit that Broetje received from copying  
7 at AHG's cassettes.

8 Q. And what is the economically appropriate measure of  
9 damages assuming Broetje's wrongful conduct in connection  
10 with what you have described as those other claims, the  
11 copying claims?

12 A. Sure. So I made two measures. One is the harm  
13 to AHG, and that is what we're seeing here. That is  
14 \$3.1 million.

15 Q. If I may interrupt.

16 A. Sure.

17 Q. I'm asking a different question. Maybe we could take  
18 this slide down. Really, I just want to make sure we're  
19 back where we left off.

20 A. Oh, sure.

21 Q. We've talked about patent infringement damages, and I  
22 want to understand what this measure of award is. How is  
23 this different from the patent infringement lost profits  
24 measure?

25 A. Right. So patent infringement is, as I explained

Ellis - direct

1 earlier, harm to AHG. And the measures I'm doing for the  
2 copying claims includes a harm to AHG but I also measured  
3 the benefit to Broetje for its wrongdoing.

4 Q. And is that what you called unjust enrichment?

5 A. That's right.

6 Q. And can you explain for us what that concept is?

7 A. Sure. The concept of unjust enrichment is that  
8 Broetje should not benefit from the wrongdoing and then that  
9 should be disgorged or given back to put them back where  
10 they would have been without the wrongdoing.

11 Q. So now is where I think we probably should move to  
12 slide 115.

13 A. Sure.

14 Q. How did you calculate the amount by which Broetje was  
15 unjustly enriched?

16 A. I multiplied Broetje units by Broetje prices to get  
17 to \$12,411,632.

18 This analysis is slightly different than my  
19 earlier one. For patent infringement, I looked at the order  
20 dates, the count of units; and for this one I looked at  
21 shipping dates or delivery dates.

22 Q. But for the Broetje units calculation, whether you  
23 count -- well, is it correct that you matched the purchase  
24 orders to the shipping documentation?

25 A. To the best of my ability, yes.

Ellis - direct

1 Q. So you didn't double count a purchase order and  
2 shipping for this same order; correct?

3 A. That's right.

4 Q. You counted only once?

5 A. That's right. So in my attachment 5, I show my order  
6 date, but that can be, those are only counted once and those  
7 are -- those total units are also consistent with shipping  
8 dates.

9 Q. So the equation for unjust enrichment is shown here,  
10 and that is Broetje units times Broetje prices?

11 A. That's right.

12 Q. What source did you use for the Broetje prices?

13 A. Again, the same file of underlying documents like  
14 invoices and the like.

15 Q. Why is this number for unjust enrichment larger than  
16 the number for lost profits?

17 A. For several reasons. The first reason is we're  
18 going for a longer time frame. Patent infringement ends in  
19 December 7, 2009 and here we're going through the end of  
20 2013.

21 In addition, we're looking at revenues and not  
22 backing out costs in this calculation whereas lost profits  
23 is just a profit number. Those are the things I can recall.

24 Q. Did Broetje's placement in the supply chain have  
25 anything to do with the difference in this number?

Ellis - direct

1 A. Yes.

2 Q. Are there slides that you asked us to prepare to help  
3 illustrate this proposition?

4 A. I have. I think it's the next slide here.

5 This just illustrates that the numbers should be  
6 bigger. So AHG pays a manufacturer, and that is a cost to  
7 AHG. They mark up the product and sell it at wholesale to  
8 Broetje, and then Broetje marks it up again and sells it at  
9 what I would call retail. So AHG's profit is just isolated  
10 right there in the supply chain.

11 Q. So we're looking at, what, PDTX-116 and you are  
12 talking about the supply chain before the wrongful acts;  
13 correct?

14 A. That's right. When everything was working.

15 Q. So if we move to slide 117, what did the supply chain  
16 look like after Broetje's wrongful acts?

17 A. So now it's Broetje's capturing the profit at the  
18 manufacturer level. They're capturing the profit AHG would  
19 have made. They're also capturing the profit they were  
20 making before. So the numbers should naturally be a higher  
21 number.

22 MS. SHARP: And if we could take this slide down.

23 BY MS. SHARP:

24 Q. I think you also said in connection with the reasons  
25 why the measure of damages for the other claims is a larger

Ellis - direct

1 number, that there were issues with Broetje's cost data.

2 Can you explain that to us?

3 A. Sure. I think I have a slide on that. But --

4 MS. SHARP: And I would ask for slide 118.

5 BY THE WITNESS:

6 A. Yes. So this is slightly different than the data  
7 that I used to count of the accused units. That data was  
8 incomplete, but what I did find was reliable. The data  
9 that I received here was just plain unreliable. And here,  
10 I listed up some reasons why.

11 Dr. Peters testified that they don't have cost  
12 data specific to these system components, so what they did  
13 is they gave us this project level information. And we saw  
14 the pictures of the giant rivet machine. And this is a tiny  
15 piece, less than five-six percent. They gave us that level  
16 of profit and cost information, and it's just wrong to use  
17 that kind of stuff for this exercise.

18 There is nothing I found that shows that the  
19 project level costs and profit actually applies to these  
20 components. In fact, everything I'm seeing is inconsistent  
21 with the other data in the case.

22 Q. So is it correct that you did not have reliable costs  
23 data that you could use to subtract costs from revenues?

24 A. That's right. Because it was unreliable, I didn't  
25 feel comfortable using it.

Ellis - direct

1 Q. Whose burden is it to prove cost data in connection  
2 with this calculation?

3 A. It would be Broetje's burden as I understand it.

4 MS. SHARP: Now, if we could go to slide 114,  
5 because I know we've been talking about unjust enrichment  
6 and that calculation. Actually, I'm sorry, slide 119.

7 BY MS. SHARP:

8 Q. In the second category of other claims, there are two  
9 calculations: unjust enrichment and lost profits. Is it  
10 correct that lost profits is an alternative calculation?

11 A. It is. The one I would use is the unjust enrichment  
12 calculation, because the lost profits, even though for  
13 patent infringement, even though it doesn't cover all of  
14 the harm to AHG, it's a harm to AHG measure. The unjust  
15 enrichment is a benefit to Broetje measure, so it's  
16 different.

17 Q. Is that another way of saying in your opinion, the  
18 appropriate measure of damages is unjust enrichment?

19 A. Yes, in the amount of \$12,411,632.

20 Q. The alternative calculation here of lost profits, was  
21 that conceptually, in terms of the equation, any different  
22 from the lost profits equation that you discussed earlier?

23 A. No. The analysis is, from a substantive standpoint,  
24 it's the same, or very similar.

25 MS. SHARP: I don't have any other questions at

Ellis - cross

1 this time.

2 THE COURT: Okay. Cross-examination.

3 CROSS-EXAMINATION

4 BY MR. CAHR:

5 Q. Good morning, Mr. Ellis.

6 A. Good morning.

7 Q. And just to get this out of the way. You made a  
8 mistake in your most recent report and there were some  
9 things in zeroes rather than dollars and you corrected that.  
10 So that mistake is no longer of record; is that correct?

11 A. I didn't -- I presented the data properly but I agree  
12 with you, I think I might have had a Euro sign and I should  
13 have had a dollar sign but the data was correct.

14 Q. But as soon as you recognized it, you corrected it so  
15 it's good?

16 A. That's what I tried to do.

17 Q. Now, Mr. Ellis, you believe that each and every sale  
18 by Broetje of the accused cassettes from 2003 stretching  
19 forward to 2013 would have been made by AHG instead; is that  
20 correct?

21 A. Which claims are you talking about?

22 Q. Let's take trade dress, for example.

23 A. Okay.

24 Q. You believe every sale made by Broetje of a cassette,  
25 a distribution rack, or a loading station from 2003 all the



Ellis - cross

1 way through 2013, every one of those sales made by Broetje  
2 would have been made by AHG; is that correct?

3 A. I did for my lost profit analysis but not for my  
4 unjust enrichment analysis.

5 Q. Okay. So let's just take the lost profit analysis.  
6 The lost profits, from 2003 to 2009, you believe that every  
7 single one of the sales that were made by AHG would have  
8 been made by Broetje -- that were made by Broetje -- strike  
9 that. Every single sale that would have been made by  
10 Broetje from 2003 to 2009 would have been made by AHG?

11 A. Okay. So we're talking about --

12 Q. Lost sales.

13 A. -- lost sales for patent infringement, 2003 to 2009.

14 Q. Yes.

15 A. Yes, I agree with that statement.

16 Q. And for your lost profits analysis for the trade  
17 dress from 2003 to 2013, you believe that every sale that  
18 would have been made by Broetje during that period of time  
19 alternatively would have been made by AHG but for the acts  
20 of infringement that you are alleging?

21 A. That's right, with one small qualifier for the  
22 copying claim.

23 Q. And by copying, you mean trade dress?

24 A. Trade dress, copying, yes. I might characterize that  
25 analysis as slightly different. That would be 2005 to 2013

Ellis - cross

1 if we went off delivery dates as opposed to order dates.

2 Q. Okay. But --

3 A. Your units don't change. It all adds up to equal the  
4 same total.

5 Q. But correct me if I'm wrong. You're -- actually it's  
6 probably easier to take a look at this.

7 MR. CAHR: Can I have exhibits 621.24, please,  
8 up on the screen?

9 I hope we can turn that sideways.

10 BY MR. CAHR:

11 Q. If you could highlight just the years 2003 and 2004,  
12 please.

13 This is a summary of Broetje's unjust enrichment  
14 revenues 2003 to 2013. So you were including years before  
15 2005 in your unjust enrichment calculation, were you not?

16 A. Yes. I think you are getting at a distinction  
17 between when the order was placed and when the product was  
18 shipped or delivered.

19 Q. But you just said -- correct me if I am wrong -- a  
20 couple of minutes ago while you were being questioned by Ms.  
21 Sharp that for the unjust enrichment calculation you  
22 entirely used shipping dates while for the lost profits  
23 analysis you entirely used order dates?

24 A. I think the answer is yes. When you collapse it all  
25 into 2013 from this time period, I think it's true under

Ellis - cross

1 both instances. I counted every product once, so it might  
2 have been ordered in '03, delivered in '05, ordered in '04,  
3 delivered later.

4 Now, at the tail-end, I think Broetje only gave  
5 us delivery, so I really couldn't count up the orders. I  
6 didn't have a basis to do that. So it would only make a  
7 difference on that cutoff whether you ordered in 2013 and  
8 delivered, then I would count that. In this case I didn't  
9 because Broetje didn't provide me the information.

10 Q. But this says you did, it says that you included 2003  
11 and 2004 unjust enrichment damages in your calculation,  
12 which would mean that you were using order dates.

13 But you had said before that you were using ship  
14 dates. Obviously, that is an important distinction. That's  
15 just this one little section I am talking about is what,  
16 450, or \$460,000?

17 A. That I don't see that substantively. There is no  
18 substance to that distinction that you are making. It was  
19 ordered in '03. Whether it was delivered in '05, that's  
20 fine. I am still counting it. It's from the full-time  
21 period.

22 Q. Do you have any specific information about when the  
23 first use date in commerce was of the trade dress?

24 A. No, I don't.

25 Q. So if the first use date of the trade dress turned

Ellis - cross

1 out to be 2004, this would be incorrect. Correct?

2 A. No.

3 Q. Why not?

4 A. Because I only counted the sales ones, so you might  
5 see the order in '03. If it was delivered in '04 and '05, I  
6 didn't count twice. It's just counted once.

7 So the delivery dates matter, for unjust  
8 enrichment, I counted the right numbers.

9 The order date matters for unjust enrichment, I  
10 also counted the right dates. The number is not going to be  
11 different. It only matters on the tail-end in 2013, for the  
12 timing difference.

13 Q. Just to clarify, let's say that in 2003 somebody  
14 ordered a system, and it was delivered with AHG racks and  
15 AHG loading stations and a Broetje cassette. Do you believe  
16 that the AHG rack and the AHG loading station should be  
17 considered as part of your damages?

18 A. No. In fact, that very situation happened. We heard  
19 Mr. Bornes testify in 2003 there was these big orders for  
20 the entire system, and Broetje took the AHG racks and  
21 loading stations. So customers ordered what they thought  
22 they were getting. They thought they were getting AHG.  
23 Then Broetje took those orders and two years later delivered  
24 Broetje cassettes with AHG racks and distribution -- loading  
25 stations and distribution racks.

Ellis - cross

1 Q. But it's true you included those loading stations and  
2 distribution racks in your collaboration, didn't you?

3 A. That is untrue. We excluded those. I only counted  
4 the cassettes that were Broetje and I did not count the  
5 racks and loading stations.

6 Q. Could we please go to 621.23, please. Could you  
7 please highlight 2003 and 2004. If it turned out that in  
8 2004 only -- fit turned out that in 2003 and 2004 the only  
9 distribution racks ordered were delivered as AHG racks, AHG  
10 distribution racks and AHG loading stations, this would be  
11 incorrect? This is a hypothetical.

12 A. I am not following your hypothetical, because you are  
13 trying to apply it to the facts. And every single item on  
14 here said Broetje. So I don't understand --

15 Q. If the facts turn out to be that nothing was  
16 shipped -- let me take that back. Strike that.

17 If the facts turn out to be that nothing was  
18 ordered or shipped in 2003 or 2004 that was a loading  
19 station or distribution rack made by Broetje, that your  
20 inclusion would make it wrong, if the facts show that to be  
21 the case?

22 A. I agree, if that's true. But, in fact, we found for  
23 these two distribution rack and loading stations, those  
24 items, we found that there were Broetje orders, clearly. I  
25 stand by my calculation.

Ellis - cross

1 Q. That's fine. We will talk about those things later.

2 If that was the case, this would be wrong?

3 A. I don't think so. I didn't do what you are

4 suggesting --

5 Q. Not to say that your calculations were wrong. I am

6 saying if that turns out to be the case, your calculation is

7 wrong?

8 A. Maybe let me try and restate. You are saying if I am

9 wrong, I am wrong? I agree with that.

10 Q. If the facts turn out to be that the information that

11 you were utilizing was incorrect, that these calculations

12 would then not reflect the correct calculation?

13 A. So if I relied on a document from Broetje that was

14 incorrect, it would be wrong. I agree with that.

15 Q. All right, we will move on.

16 You were saying that but for the sales made by

17 Broetje, AHG would have made all of those sales, going back

18 to what we were talking about a few minutes ago? Is that

19 correct?

20 A. Yes.

21 Q. And just to be complete, you didn't separately

22 calculate damages for intentional interference or those

23 things, on the lost profits side, it's the same analysis?

24 A. That's right.

25 Q. Is it your opinion that Broetje won every single

Ellis - cross

1 system bid from 2004 until 2013?

2 A. Maybe help me understand what you are saying. They  
3 won every system bid?

4 Q. Yes. So if Boeing is interested in building a new  
5 replacement for the C17, and they want to have machinery  
6 installed to rivet the fuselage of those replacements for  
7 the C17, and they go to Broetje, ElectroImpact, Gemcor, is  
8 it your opinion that Broetje won every single one of the  
9 bids like that that took place between 2004 and 2013?

10 A. I have no opinion, because I don't think Broetje  
11 produced any bids. But I would assume based on my  
12 experience that Broetje didn't win all the bids. Maybe they  
13 did. I don't think they would have.

14 Q. Do you know if ElectroImpact and Gemcor only  
15 installed AHG fastener systems for bids they may have won?

16 A. I did visit Gemcor and talked to them. And I  
17 understand the story on ElectroImpact.

18 What I know is that AHG's technology for this  
19 application is the standard in the marketplace. So that's  
20 just what's happened. Nothing else has survived. It's just  
21 this and Broetje.

22 Q. Nothing else has survived. So Gemcor doesn't sell  
23 vibratory bowl systems?

24 A. They do. When I visited their plant, I saw one.  
25 They were attaching it to a rivet machine, and I asked them

Ellis - cross

1 about it, because they were showing me a system with AHG's  
2 loading station and distribution rack, and they told me that  
3 for the application, vibratory bowls are never used. They  
4 showed me this other machine. They said it's a whole  
5 different deal in their mind.

6 The machine that I was getting on, you need an  
7 elevator to go up to the top. The other machine was this  
8 really small one.

9 Q. And F2C2 mostly sells to integrators in the United  
10 States. Correct? Is that your understanding?

11 A. I think that might differ by year, based on the sales  
12 data. But they do sell to both integrators and the end  
13 customers.

14 Q. Would you disagree with the representation -- I think  
15 this is right -- that during the let's say 2004 till 2009,  
16 that the vast majority of AHG's sales were to Gemcor?

17 A. I don't know that to be true. I don't have any  
18 information one way or another on that.

19 Q. Phrasing it differently, before the split between  
20 Broetje and AHG, were most of AHG's sales through Broetje?

21 A. That's true, yes.

22 Q. And Mr. Hage, yesterday, said that the integrators --

23 MS. SHARP: Objection to the question because  
24 Mr. Cahr is recounting testimony.

25 MR. CAHR: I will rephrase it.



Ellis - cross

1 THE COURT: All right.

2 BY MR. CAHR:

3 Q. Did you hear Mr. Hage yesterday talk about the  
4 integrators and the importance of the integrators to AHG?

5 A. Yes. He also talked about the importance of all  
6 customers. I agree that every customer is important.

7 Q. When they are selling to integrators, really, the  
8 integrators are the ones who are making the sale to Boeing  
9 or to Northrop Grumman or Spirit or Vought. Isn't that  
10 correct?

11 A. Yes, its just like my supply chain, they would be  
12 marking it up and selling it to someone else.

13 Q. Do you believe that the marketing efforts of Gemcor  
14 or ElectroImpact or any of those integrators might have an  
15 impact on the successful sale of those products?

16 A. I don't doubt that. It's a combination of customers  
17 requesting the technology. It just being the standard in  
18 the industry, everyone is pushing to sell this stock. I  
19 don't have any doubt on that.

20 Q. Did you perform any market analysis to determine what  
21 percentage of the decision-making is based on the automatic  
22 fastener feed system versus the large riveting machine?

23 A. Can you restate that question?

24 Q. Did you perform any marketing analysis to determine  
25 what percentage of the decision-making process from these

Ellis - cross

1 companies, like Boeing, are driven by the choice of the  
2 automatic fastener feed system versus the enjoys of the  
3 gigantic Gantry riveting system?

4 A. A quantitative analysis, no.

5 Q. And do you believe that -- if it would be okay, could  
6 you put up PDTX-118.

7 This is your slide. Correct?

8 A. Yes.

9 Q. And you note at the back that Broetje, when it was  
10 providing these project cost information numbers, that they  
11 were providing numbers that reflected that the sales of the  
12 cassette systems were six percent of the total system that  
13 was being purchased?

14 A. On the high end, yes.

15 Q. So if someone is making a choice about which gigantic  
16 Gantry riveting system that they are going for purchase,  
17 which is going to determine how well their planes  
18 successfully remain in the air, do you think that perhaps  
19 the quality of the riveting system might play a role of some  
20 kind in their choice of which company to go with?

21 A. Riveting system, rivet delivery system?

22 Q. Does ElectroImpact or Broetje or Gemcor, in  
23 responding to a bid from Boeing, say to them, we will  
24 provide this part of it, but don't worry, we will find  
25 someone else to provide the rest? Or do they say, we are

Ellis - cross

1 going to provide to you a package and this is going to be  
2 our response?

3 A. They probably try to provide a package. But I know  
4 that Boeing specifically requested AHG's technology by name.  
5 So I think so -- we have heard earlier, these are smart  
6 people, these engineers. They understand that the rivet  
7 machine is probably important, the fastener delivery machine  
8 or system is also very important, and they understand that  
9 and they request AHG's technology.

10 Q. Did you look at RFPs from Boeing, Spirit, Vought, any  
11 of those companies, did you look at those in performing your  
12 analysis?

13 A. If you tell me that you produced them, then I will  
14 say I looked at them.

15 Q. I don't know that we produced them. I was wondering  
16 if you looked at them?

17 A. I don't know, then.

18 Q. So you don't know whether or not Spirit bought  
19 Boeing, Northrop Grumman, Apache, any of the big companies  
20 that manufacture all of these airplanes, whether they are  
21 saying to the integrators, you know, you got to use an AHG  
22 system here, or you got to use a cassette system here? You  
23 don't know, do you?

24 A. I do know two things. I know --

25 Q. Can you please answer my question.

Ellis - cross

1 A. I am telling you I don't.

2 THE COURT: Mr. Cahr, you are asking some long,  
3 difficult questions.

4 MR. CAHR: My apologies, Your Honor.

5 THE COURT: Let's stop interrupting one another.  
6 Only one of us can talk at a time.

7 Mr. Cahr, if you want more focused, shorter  
8 answers, ask more focused, shorter answers.

9 MR. CAHR: I will, Your Honor.

10 BY MR. CAHR:

11 Q. Do you believe that the Boeing, Spirit and Vought  
12 request for proposal specify AHG products?

13 A. I have no way -- no information one way or the other  
14 to even know that.

15 Q. You said a few minutes ago that these are smart  
16 engineers and they know what they are purchasing. Does that  
17 mean that that is going to reduce the chance that they are  
18 going to purchase the wrong system?

19 You were talking about damages. Let me go back.  
20 You were talking about what drives demand. And am I correct  
21 in believing that you are saying that confusion, which is  
22 what trade dress infringement is, drives demand for the  
23 Broetje project?

24 A. I hadn't thought about it that way. But that sounds  
25 right to me.

Ellis - cross

1 Q. So you believe that Boeing, Spirit, and Vought, who  
2 are buying these gigantic machines, are confused about whose  
3 automatic fastener feed system they are purchasing?

4 A. For the accused sales, I think there was confusion,  
5 yes.

6 Now, confusion in terms of the look, we saw the  
7 Coke can, for example, at the beginning, I buy the Coke, or  
8 Diet Coke, for me, not because the can looks a certain way  
9 but because I look at the can and I see it and I know what's  
10 inside.

11 Q. How much does a can of Coke cost?

12 A. Not very much.

13 Q. How much does a riveting system cost?

14 A. It costs a lot.

15 Q. And do you put more -- you do work on damages.

16 A. Sure.

17 Q. Do you put more work into your purchasing decisions  
18 when they are small or when they are big?

19 A. I usually put more work into a big decision maybe  
20 like a car.

21 Q. And would you purchase the car because of the tires  
22 on the car?

23 A. I purchase the car because of how it looks, who makes  
24 it, the reputation they have. I don't look at everything  
25 under the hood. If I know it's a certain make, then I have

Ellis - cross

1 an expectation of a certain performance.

2 Q. Let me rephrase it differently. Would you buy the  
3 car because of what the tires looked like?

4 A. The tires alone?

5 Q. Yes.

6 A. I don't know. I don't think I would.

7 Q. You heard Mr. Hage say yesterday that they told their  
8 customers back in 2008 about this dispute and they were  
9 suing Boeing; correct?

10 A. I'm sorry. Could you repeat that? I told someone?

11 Q. No, no, no. Mr. Hage yesterday told this Court that  
12 they told their customers in 2008 about this dispute and  
13 that they were suing Broetje. Did you hear that testimony?

14 A. I hear a lot of dates with regard to disputes.

15 Q. But if it turned out that they told their customers  
16 in 2008 about this dispute, do you believe that would make  
17 it highly unlikely that anyone could be confused after 2008?

18 A. I don't know exactly who was told, who that might  
19 have been, if it ever made it out of a legal department. I  
20 don't know.

21 Q. Let's say that Boeing was told. Do you think that  
22 would reduce the likelihood of confusion?

23 A. Boeing is a giant company with 100,000 employees. It  
24 just depends on who they told and whether that made it out  
25 to the person making a decision. I don't know.

Ellis - cross

1 MR. CAHR: Okay. Can we put up PDTX-100,  
2 please?

3 BY MR. CAHR:

4 Q. Now, you mentioned the fact that the loading  
5 stations, the racks, and the cassettes are inextricably  
6 linked? Is that a correct summation of your position?

7 A. I didn't use those words, but if you want to say  
8 that, that's fine.

9 Q. Well, you would you say it?

10 A. I would say there was a functional link, a marketing  
11 link, and an economic link.

12 Q. You are aware that I think around 34 percent of the  
13 fastener cassettes sold by Broetje before the patents  
14 expired had round tubes; correct?

15 A. I'm actually not aware of that. I'm aware that that  
16 is what you are saying. I'm sorry. I'm aware that that is  
17 what you are saying but I'm not sure exactly what you mean  
18 when you say that.

19 Q. Okay. Let's phrase it this way. Hypothetically, if  
20 Broetje sold fastener cassettes with round tubes and let's  
21 say 34 percent of them were round tube cassettes during the  
22 patent period from 2004 -- or 2003 we'll give you, 2003  
23 until 2006 when -- in 2009 when the patents expired. Would  
24 racks and loadings stations sold with those round tube  
25 cassettes be properly included with the damages?

Ellis - cross

1 A. I can't answer that. I haven't done that analysis.  
2 But I can tell you which analysis I would need to do to come  
3 to that conclusion, if you would like to hear it.

4 Q. But you didn't do that analysis before?

5 A. That was impossible for me to do.

6 Q. Why was it impossible for you to do?

7 A. You haven't shown me even one of these. You call it  
8 round. I don't know if it's round. All these tubes are  
9 round on the outside.

10 My level of distrust with regard to Broetje's  
11 information is very high as this point. They said the cost  
12 data was this, and it wasn't true. They said the price is  
13 were very low, but that wasn't true based on the underlying  
14 documents. They gave me four sales summaries and said this  
15 is the right one each time. All of them are wrong. And  
16 then they said, all of a sudden, after the technical experts  
17 were filed, that there is this round tube and nobody has had  
18 a chance to look at it.

19 To be a substitute, the thing has to be  
20 noninfringing, and I don't -- I can't say that it's  
21 noninfringing. I have no information. The technical  
22 experts haven't even looked at it. How can I answer this?

23 Q. Let me ask you two quick questions then. You  
24 excluded the round tube cassettes from your calculations;  
25 right?



Ellis - cross

1 A. That's right. Because I wasn't sure if they were  
2 noninfringing. I know they're not accused, for now, in this  
3 case, but that doesn't mean that they're not infringing and  
4 that they're a substitute. They have to be technically  
5 feasible, which means noninfringing, and a technical expert  
6 has to tell me that and they haven't.

7 Q. You heard Dr. Kytomaa yesterday on the stand say that  
8 round tubes do not infringe the patent, didn't you?

9 A. I heard him answer a hypothetical, and you are trying  
10 to say that the real world facts are the same and they are  
11 not. We don't know that.

12 I have something else to say.

13 Q. Go ahead.

14 A. Thank you. I also know that the round tubes that  
15 were identified to me late in the game are a completely  
16 different size than all of the other tubes that we're  
17 looking at. They're not a substitute. So I also know that.

18 Q. And correct me if I'm wrong, so what you did was you  
19 subtracted the round tubes because they were not accused  
20 but you didn't subtract the convoyed sales associated with  
21 loading stations and distribution racks sold with those  
22 round tube cassettes?

23 A. I only kept in the distribution racks and loading  
24 stations associated with what is accused. That remains in.  
25 That's what I kept in and that's all I kept in.

Ellis - cross

1 Q. So if there a project that sold that involved just  
2 round tubes and you included the loading station or the  
3 rack, then that would be incorrect?

4 A. Not necessarily. There a project, 1600, that had a  
5 loading station and distribution rack and some round tubes,  
6 but if you look at project 1599, the one right before that,  
7 they ordered a whole bunch of accused cassettes for that  
8 same location.

9 Q. Well, that 1599, if I recall, is 50 something percent  
10 round tubes, and so did you apportion it out?

11 A. No, I did not.

12 MR. CAHR: While we're talking about  
13 apportioning and fractions, can you please go to 103,  
14 please.

15 BY MR. CAHR:

16 Q. Now, you say on this slide that components were sold  
17 in the same proportions; is that correct?

18 A. That's right.

19 Q. And you used these pie charts to illustrate that;  
20 correct?

21 A. Yes.

22 Q. But the number of cassettes sold in the first chart  
23 is 28 percent larger than the number of cassettes sold in  
24 the chart on the far right; isn't that correct?

25 A. It goes from, one is 21 percent and one is

Ellis - cross

1 29 percent, yes.

2 Q. And then I took out a calculator last night and did  
3 the math and it's 28 percent?

4 A. If you tell me that.

5 Q. Is 28 percent the same proportion as? Is something  
6 that is 28 percent different the same proportion?

7 A. I think it's not exactly the same, but I think you  
8 are mischaracterizing the data here.

9 Q. Well, the number of loading stations in the second  
10 chart is about 40 percent larger than the percentage in the  
11 first chart. Is 40 percent the same proportion, 40 percent  
12 larger the same proportion?

13 A. These are not the same proportions. They are  
14 similar. And what I mean by that is every job is different,  
15 so one job might be big and have two or three distribution  
16 racks, and one loading station; one job might be small and  
17 just have one distribution rack, and a loading station; and  
18 they might order extra cassettes for one and not the other.

19 But the bottom line here is that the proportions  
20 are generally the same, and every time you see the sale of  
21 the cassette, you will see the sale of a distribution rack  
22 and loading station to the same customer. It happens every  
23 time.

24 Q. So just to reiterate, you are not disagreeing with  
25 me that 40 percent and 28 percent larger are not the same

Ellis - cross

1 proportions?

2 A. I agree that these are not exactly the same, and I  
3 think I said that when I first testified.

4 Q. I just want to make sure we agreed on that.

5 We can go to PTX-621 -- I'm sorry 621.41. If  
6 you can please highlight the third grouping from the top.  
7 Going to 2002 and 2003.

8 Now, this is a section on incremental costs;  
9 correct?

10 A. Yes. I think that chart, it's hard to read, but that  
11 is incremental profit.

12 Q. And just to clarify, this is just a small part of a  
13 few pages which lists by year all of the different  
14 incremental costs that Broetje indicated?

15 A. Yes, by court order. I think it's historical.

16 Q. And if I represent to you that the incremental costs  
17 represented by these royalties, these inventor royalties and  
18 the Dassault royalties come to about \$2.8 million during the  
19 relevant time frame, do you have any reason to disbelieve me  
20 on that?

21 A. No, I will accept that representation.

22 Q. Royalties when paid to nonparties in the case are  
23 typically subtracted from the award that you are trying to  
24 obtain; correct?

25 A. It depends.

Ellis - cross

1 Q. If you were making a lost profits claim, would you  
2 typically subtract the royalties that you have to pay to a  
3 third party?

4 A. I would have to say again it depends. Sometimes it's  
5 appropriate, sometimes it's not.

6 Q. When would it be not appropriate?

7 A. In this case, when there is an obligation to pay but  
8 say AHG gets a check for the sales it would have made, then  
9 it would have an obligation to pay that royalty out of that  
10 check.

11 Q. So if there is no obligation to pay a judgment, then  
12 it should be subtracted; correct?

13 A. No obligation to pay a judgment?

14 Q. Well, that is what you are seeking; right? A  
15 judgment of damages.

16 A. It's an obligation to pay a royalty is kind of what I  
17 was thinking.

18 Q. Well, there is an obligation to pay a royalty on  
19 a damage award as opposed to an award of sales, let's say.  
20 Then you don't have to subtract them, but if there is an  
21 obligation -- well, let me get -- I'm getting a little bit  
22 too convoluted with that. Let me clarify.

23 If you are obligated to pay the royalties from a  
24 judgment, then they are properly not deducted; correct?

25 A. I would not subtract them from my incremental profit

Ellis - cross

1 calculation because I will have to subtract them later. So,  
2 yes. It's like taxes.

3 Q. Right.

4 A. If you get a judgment, you still have to pay the IRS.

5 Q. Right.

6 A. So you ask for that amount so that you can.

7 Q. Right. That totally makes sense. And if you are  
8 not obligated to pay that out, then you would deduct it;  
9 correct?

10 A. If you are not going to pay it out, then you would  
11 deduct it.

12 Q. And isn't it true that you have not been presented  
13 with any document showing that the plaintiffs are obligated  
14 to pay proceeds from this litigation?

15 A. I'm not sure I agree with that statement.

16 Q. Have you seen a document that says that the  
17 plaintiffs are obligated to pay Dassault the proceeds from  
18 litigation?

19 A. The Dassault agreement, it requires a payment on  
20 sales, and these we're characterizing as lost sales. So if  
21 you interpret it that way, I would say I have. If you are  
22 saying that the Dassault agreement would somehow predict  
23 some lawsuit in the future, I don't think it does. I  
24 probably didn't think about that.

25 Q. So the same thing would apply to the inventor

Ellis - cross

1 royalties then. So the inventor royalties, you are saying,  
2 should not be subtracted because they are obligated to pay  
3 those out.

4 A. That's part of the reason for inventor royalties.  
5 The other part is it's an accounting thing, so it's recorded  
6 as an expense, but it's from F2C2 to AHG. So when you  
7 collapse the two, there is no difference. It's taking money  
8 from one pocket and putting it into the other. You really  
9 haven't paid someone outside, so to subtract that may be a  
10 mistake.

11 Q. Maybe I'm misremembering, but I think we concluded  
12 that 97.5 of the inventory royalties are being paid to  
13 non-plaintiffs in this case. Isn't that correct?

14 A. I think it's -- and it's been a few years since I  
15 looked at this. I think the group that is receiving the  
16 royalties is still AHG.

17 Q. So you think that Phillippe Bornes is AHG?

18 A. Phillippe Bornes worked at AHG at the time.

19 Q. He is not at AHG now.

20 A. Right. So in that case, so there is, I agree with  
21 you there is a part that is going from one pocket to  
22 another, and consistent with my earlier discussion of  
23 Dassault, I specifically asked AHG what they would do, and  
24 they said they would pay it out.

25 Q. And so if the \$2.8 million should have been

Ellis - redirect

1 subtracted, that would reduce your damages claim on the lost  
2 profits by 90 percent, wouldn't it?

3 A. If you say -- if you did the math, I would accept  
4 that.

5 Q. And I noticed that about 80 percent of the damages  
6 you allege derived from non-accused products, the loading  
7 stations and the racks. Would you accept that as true?

8 A. Yes, I think AHG received the benefit -- basically  
9 received benefits from the cassette and the whole system  
10 they designed around it, yes.

11 Q. So 80 percent of the royalties would be from loading  
12 stations and racks. That is, 80 percent of the damages  
13 would come from loading stations and racks?

14 A. From a mechanical sense, yes. But from a substantive  
15 sense, I would disagree with that.

16 MR. CAHR: No further questions.

17 THE COURT: Okay. Redirect.

18 REDIRECT EXAMINATION

19 BY MS. SHARP:

20 Q. Mr. Ellis, I want to make sure that we're all clear  
21 on some of the testimony that you gave. Since the last  
22 topic had to do with royalties, let's talk about that first.

23 When does the obligation to pay a royalty arise?

24 A. When the sale happens usually.

25 Q. If AHG can't make sales because Broetje infringed,



Ellis - redirect

1 does AHG have an obligation to pay royalties on sales it  
2 didn't make?

3 A. On the sales it lost, it wouldn't have made a payment  
4 at the time, no.

5 Q. Is that why you didn't back out royalties?

6 A. Yes, because once -- if there is an award for lost  
7 profits, then I'm satisfied, by talking to the company, I'm  
8 satisfied that they will pay those royalties, just like they  
9 will pay their taxes.

10 Q. And that was the tax analogy. The obligation arises  
11 later?

12 A. That's right. After you -- if you collect an award.

13 Q. There a little bit of discussion about vibratory  
14 bowls. Are vibratory bowls acceptable noninfringing  
15 substitutes for the AHG cassettes?

16 A. No, they're not.

17 Q. Why not?

18 A. We've heard a lot of testimony about the problems  
19 with those, but I think even Dr. Peters, in his testimony,  
20 said they just don't use that on their systems. It's either  
21 AHG's technology or their accused technology for these rivet  
22 systems.

23 Q. Okay. And you were asked a hypothetical about some  
24 hypothetical round tubes. Are round tubes acceptable  
25 noninfringing substitutes for AHG's cassettes?

Ellis - redirect

1 A. They cannot be in this case because I can't say that  
2 they're noninfringing, among other things.

3 Q. And what are the other things?

4 A. Again, they're a completely different size than all  
5 of the other cassettes sold. They cannot be a substitute  
6 for the different sized cassette.

7 Q. Despite that opinion, did you back out the round  
8 tube cassettes from your calculations when you did your  
9 supplemental report?

10 A. I did.

11 Q. So your supplemental report does not include damages  
12 for any round tube cassettes; is that right?

13 A. That's right. When I discovered that and I was able  
14 to quantify that, I was able to take them out.

15 Q. You continued to include -- if I understood the  
16 question and answer with Mr. Cahr, you continued to include  
17 the rest of the system that was sold with the round tube  
18 cassettes. Why?

19 A. Because they were also sold to the exact same  
20 location where a bunch of accused cassettes were ordered  
21 first.

22 Q. And the last topic, if we can clear it up, had to  
23 do with these dates, and the columns in which a number  
24 appears.

25 Focusing on the first category of damages we

Ellis - redirect

1 had. When does patent infringement occur?

2 A. As I understand it, when there is a sale or offer  
3 for sale, that's even the make or use of something in the  
4 United States, is infringing.

5 Q. To determine whether there was an offer of sale, did  
6 you rely on purchase orders?

7 A. Yes. So when I saw a purchase order with the company  
8 and a U.S. address on it, we request ordering this stuff.  
9 I counted it as an offer for sale or sale. I'm not the  
10 attorney on that, but that is when I counted it for patent  
11 infringement.

12 Q. And was there typically a lag between the purchase  
13 order and the actual delivery on the purchase orders?

14 A. Almost always. It could be a year, two years.

15 Q. Did you match purchase orders to delivery slips and  
16 count those sales only once or did you count them twice?

17 A. I would like to have done that with all of them, but  
18 there some giant holes. But I am confident, 100 percent  
19 confident I only counted everything once.

20 Q. So does it matter to your total number whether you  
21 count the purchase order from 2003, delivered in 2005 or 6  
22 or 7, in the 2003 column or in the column when the delivery  
23 occurred? Does it change your numbers?

24 A. In substance, it doesn't change the math or the total  
25 number at all.

Benczkowski - direct

1 MS. SHARP: Thank you.

2 THE COURT: All right. Mr. Ellis, you may step  
3 down.

4 Mr. Lindvall, what is next?

5 MR. LINDVALL: Your Honor, subject to just  
6 making sure we haven't checked all our exhibits that have  
7 been admitted, plaintiff is going to rest its case.

8 THE COURT: Okay. Thank you. Mr. Kelleher.

9 MR. KELLEHER: Your Honor, we would make the  
10 usual motion. We can elaborate at a later time.

11 THE COURT: Okay. We'll do that.

12 MR. KELLEHER: Defense calls for its first  
13 witness, Mr. Ken Benczkowski.

14 ... KENNETH BENCZKOWSKI, having been first duly  
15 sworn, was examined and testified as follows ...

16 MR. KELLEHER: Your Honor, may I approach?

17 THE COURT: Good morning. Welcome,  
18 Mr. Benczkowski.

19 THE WITNESS: Thank you.

20 (Brushing against microphone.) Sorry.

21 THE COURT: You may approach, Mr. Kelleher.

22 (Binders passed forward.)

23 DIRECT EXAMINATION

24 BY MR. KELLEHER:

25 Q. Good morning, Mr. Benczkowski. Could you please

Benczkowski - direct

1 introduce yourself to the jury?

2 A. Yes. My name is Ken Benczkowski. I am the President  
3 of Broetje Automation USA.

4 Q. And where do you live?

5 A. I live in Buffalo, New York.

6 Q. Now, could you tell us where you went to school?

7 A. I went to school at the State University of New York  
8 in Buffalo, and I'm a graduate from the year of 1980.

9 Q. Could you please tell us your job history?

10 A. Right out of school, I actually went to work at  
11 Gemcor, and I worked at Gemcor holding various positions  
12 there for a little more than 20 years -- 20 years and some  
13 months.

14 I then left Gemcor and went to work for a  
15 company in Minnesota called Power Systems which is a  
16 robotics company also serving the aerospace industry.

17 And in 2006, I began working with Broetje USA.

18 Q. And in what capacity did you begin with Broetje?

19 A. I began as the Vice President and Chief Operating  
20 Officer, and I held that position until 2008, where I was  
21 named President.

22 Q. What did you do at Gemcor for 20 years?

23 A. At Gemcor, I had several positions. I started there  
24 working in their operations group. I was basically trying  
25 to get their spare parts and deliveries for mechanical parts

Benczkowski - direct

1 in line. And I held that position for about six months.

2 And I was then more or less transferred or moved  
3 into a customer service department which they put me in  
4 charge of where we handled the spare parts sales and then  
5 the order fulfillment process.

6 From that, I had various other positions. I  
7 was basically moving to the application engineering group  
8 because I had some tendencies to go for innovation and  
9 basically I like to interface with the customers. So I  
10 was at application engineering for about three-four years  
11 and then various sales positions, and I ended up being the  
12 director of sales, director of operations at the end.

13 Q. At Gemcor, what use did you make of F2C2 or AHG  
14 products?

15 A. We made no use of F2C2 or AHG products.

16 Q. Why not?

17 A. They were not reliable.

18 Q. Tell me, do you have any patents?

19 A. Yes. I'm co-named on five patents awarded in the  
20 U.S. with one pending and co-named on two European patents.

21 Q. So, Mr. Benczkowski, you are the president of Broetje  
22 USA. Could you tell us, what is Broetje's business?

23 A. Broetje is a turnkey provider of solutions for  
24 automatic airframe assembly challenges. So what we have is  
25 basically a tool kit or tools that we use when we go into a

Benczkowski - direct

1 supplier, an aircraft manufacturer's facility such as Boeing  
2 and we will look at their actual production flow line.

3 So we will look at the product we want to build,  
4 the rate they need to build it at, and then what we're going  
5 to do is come up with the plant layout, the flow of the  
6 material through the plant, all of the equipment that they  
7 need, whether it be the fixtures, the automatic fastening  
8 machines which also play a part in that because that is our  
9 core competence, and then we look at the material transport  
10 systems, all the scaffolding, all the hand tools, everything  
11 that is required in order to produce that product.

12 And at the end, what we basically are known for  
13 is our know-how. We're known for know-how and we're known  
14 for throughput because that is what customers are buying  
15 from us. They're buying throughput and reliability.  
16 Because every line is at a high production rate. Failures  
17 on the line are completely unacceptable.

18 And along with that, we have full services,  
19 meaning spare parts business, the service business,  
20 follow-on contracts, hotlines, things of that nature that  
21 we manage to make sure that our customers at Boeing, the  
22 Gulfstreams are all in operation 100 percent of the time.

23 Q. Mr. Benczkowski, if we identify a video that we can  
24 show the jury that shows the products and services of Broetje?

25 A. Sure.

Benczkowski - direct

1 MR. KELLEHER: Can we please show the video?

2 Can we turn the lights down a little.

3 THE COURT: How long is the video?

4 MR. KELLEHER: Six minutes, I believe, Your  
5 Honor.

6 THE COURT: Okay. We'll turn the lights down.

7 (Video played. Music heard but no commentary.)

8 MR. KELLEHER: It looks like it was only two  
9 minutes.

10 THE COURT: All right. We'll turn the lights  
11 back on. For the record, does it have an exhibit number?

12 MR. KELLEHER: Yes, Your Honor. I'll have that  
13 in one moment.

14 THE COURT: Okay. When you have it, let us  
15 know.

16 MR. KELLEHER: I think DTX-1217 is the number I  
17 have written down.

18 BY MR. KELLEHER:

19 Q. Mr. Benczkowski, could you tell us what we just saw  
20 in the video?

21 A. Yes. What you saw was one of our -- well, it was  
22 formerly one of the most popular machines, we call it an  
23 IPAC, Integrated Panel Assembly Cell, and they're used  
24 predominantly for fuselage and in some cases for the  
25 assembly of aircraft wings, depending on the processes.



Benczkowski - direct

1           What you will see in that video, there is a  
2       whole science to drilling a hole and filling it back up  
3       again. So we'll have processes that automatically drill,  
4       that will install sealant, we inspect the hole before the  
5       fastener goes in, we inspect the quality of the installed  
6       fastener, and then move on to the next hole.

7           The machine will put in basically 17 rivets a  
8       minute, which is more than eight times as productive as a  
9       man could be.

10           MR. KELLEHER: Your Honor, I think it was  
11       DTX-1820.

12           THE COURT: Okay. Thank you.

13       BY MR. KELLEHER:

14       Q.       Mr. Benczkowski, who are Broetje's customers in the  
15       United States?

16       A.       Broetje's customers in the United States, of course,  
17       are Boeing, and they have multiple facilities. So we have  
18       equipment in Seattle and Long Beach. We also have equipment  
19       in St. Louis and in Charleston for the Boeing facilities.

20           We have Vought or Triumph. It was Vought. They  
21       were bought out by Triumph. And they have facilities in  
22       Dallas, Texas.

23           And we have Gulfstream in Savannah, Georgia as  
24       our main customer base, but our largest customer is Spirit  
25       Aerosystems, which was Boeing Wichita in Wichita, Kansas.

Benczkowski - direct

1 Q. And you mentioned, Mr. Benczkowski, doing  
2 installations on giant machines like that IPAC. Could you  
3 walk us through what the purchasing process is like for one  
4 of those customers for a machine like that?

5 A. Yes. It's a very long and detailed process.  
6 Basically, our business comes, our equipment comes from  
7 usually through two avenues. One is someone is launching a  
8 brand new airplane. Like right now, the big word is on the  
9 777X. That is the replacement for the 777 aircraft.

10 Or there is a rate increase. Like, right now,  
11 the 787 is at 10. They're talking about 12 and then 14.

12 The 737 is at 38, it's going to go to 42  
13 airplanes a month, and then 45, and eventually get to 60.  
14 So these are opportunities for the equipment.

15 So what happens is that a Boeing will come out  
16 with a request for information, and they will send it out to  
17 five to eight different suppliers. Some of them will be  
18 riveting companies, or integrators like us. Others will be  
19 just plain integrators. They have to go out and find the  
20 technologies.

21 So then we will come together. We have a  
22 bidders' conference, usually at the customer's site. They  
23 will state the requirements and give us some documents.  
24 They will send us all off.

25 Basically a month later we will come back with a

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1     proposal. Once that proposal is received it will be  
2     reviewed by Boeing. Boeing will call the parties in which  
3     they have interest for presentation and detailed discussion  
4     on their response to the RFI, request for information.

5             Then Boeing will basically spend a little bit of  
6     time, determine who it is they want to participate in the  
7     formal bid process. Then what they will do is put together  
8     a specification, taking basically the best ideas from  
9     everybody who has presented, and they will go out for a  
10    formal bid.

11            We will usually get four to six weeks to respond  
12    to that bid. There will usually be a bidders' conference  
13    where you have separate conferences to meet with the  
14    customer, such as Boeing, in order to respond to the  
15    proposal.

16    Q.     Mr. Benczkowski, you mentioned a specification a  
17    moment ago. What does the specification look like?

18    A.     The specification is a very, very detailed document.  
19    That document will be, it could be a hundred, 200 pages  
20    long. It will define every aspect of the equipment. It  
21    will tell you, basically, how long the work piece is, it  
22    will say, we are drilling these materials. It is, you must  
23    use this drill spindle or this rpm in our machine, you need  
24    to have a certain clamp force pressure, you need to have a  
25    CNC control, and all the tolerances for every aspect of the

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1 machine.

2 Q. Is there ever any discussion of the fastener feed  
3 system in the specification?

4 A. There are fastener feed systems that are discussed.  
5 Usually, that is a user preference item. Sometimes, they  
6 will just say you need to provide a written fastener feed  
7 system for this spectrum of fasteners, various diameters,  
8 various lengths. In other cases they will simply say that  
9 they want a certain style of a fastener feed assembly.  
10 Usually, it is a user preference.

11 Q. What kind of styles?

12 A. There are styles available. It could be, of course,  
13 the subject of this whole discussion or meeting here, the  
14 cassettes. It could be laboratory bowls. It could be  
15 hoppers. It could be a magazine. Or something else.

16 Q. I interrupted you as you were going through the  
17 process. Could you continue?

18 A. Yes. So after we submit our final proposal, they  
19 evaluate them. Boeing will call the parties in and  
20 basically go through a detailed review of our proposal. As  
21 part of the response to the proposal, we have to respond  
22 paragraph by paragraph to this hundred-plus pages of  
23 specification documents in terms of how we are going to  
24 fulfill that requirement, what brands we are going to use,  
25 what the feed speeds are, the rates that we are going to

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1     achieve.

2                   So, then, they make their selection based on the  
3     technical and of course cost data.

4                   Once you are selected, the whole process begins  
5     actually for fulfilling the order. In that case we normally  
6     have set up design review meetings. There is a preliminary  
7     design review, which we call a PDR, which happens at about  
8     the 20-percent interval. There is a critical design review,  
9     which is about 60 to 80 percent through the project. Then  
10    there is a final design review, which is at basically 95-100  
11    hundred percent.

12    Q.       Where would that occur?

13    A.       Normally, the first PDR is at the customer site. We  
14    do that, we bring all of our skills over to interface with  
15    that customer because the customer will have a large party  
16    involved in this whole process of their own expertise.

17                  We will then have that particular meeting, which  
18    is normally a three-day meeting, to go through all of the  
19    preliminary designs. That's where we set the foundation and  
20    define, again, all of the components that we are going to  
21    use.

22                  Then at the critical design meeting, that is  
23    normally held in our factory. And the reason for that is  
24    because once we get past the PDR stage we can go ahead and  
25    begin to order all the materials that we need.

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1 Q. Is that in Germany?

2 A. It's in Germany. When they come to Germany, they can  
3 see the materials arriving on the floor. And at the final  
4 designing stage, much of it is already assembled there, so  
5 they can get a status as well as the final design statuses  
6 as we go through the whole product.

7 During that whole period, they are welcome any  
8 time to check the status of where we stand.

9 MR. HOROWITZ: Your Honor, objection. Calls for  
10 a narrative. There is no Q&A going on.

11 THE COURT: Sustained. Let's have some  
12 questions.

13 BY MR. KELLEHER:

14 Q. After the final design stage, what happens next  
15 concerning the acceptance?

16 A. The customer will basically come in. They will bring  
17 in a test panel. With their test panel they will send the  
18 fasteners that they require. They require a part program.  
19 And we will demonstrate the operation called for the  
20 machine.

21 Q. How many people will come from the customer?

22 A. It varies between six and 12, sometimes 14.

23 Q. Would there be any demonstration of the fastener feed  
24 system?

25 A. Yes. That would be an integral part of the system.

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1 So basically, we identify the spectrum of fastener feed that  
2 are employed. Those would be sent over. They would be  
3 tested in advance. It is tested in test articles, and they  
4 actually test the test article.

5 Q. Assuming the machine passes this acceptance phase in  
6 Germany, what happens next to the machine?

7 A. If there is an acceptance, we tear the machine down.  
8 We ship it the U.S. It is installed in the factory. Then  
9 we re-perform the acceptance test.

10 Now, when it goes back into the customer's  
11 facility, there is another level. Actually, the commitment  
12 has to be certified before it can go into production.

13 Q. When you say certified, what do you mean?

14 A. It means it has to meet Boeing process standards. In  
15 this whole process, Boeing has usually a process specialist.  
16 They look at things to make sure the fastener does not have  
17 a nick or mark in it, to make sure all of the holes are  
18 drilled daily and they are all within control.

19 Q. Why would they care about it meeting --

20 A. Because it has to do with flight safety. So it is  
21 very, very critical. They have their own process where they  
22 certify it themselves. Then, of course, the FAA comes in  
23 and has to certify the machine. Basically, what happens is  
24 they need to keep a log of any changes or serious faults  
25 that they can present to the FAA to make sure there is

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1 configuration control.

2 Q. About how long does the certification take?

3 A. It could take six weeks.

4 Q. So assuming the machine passes certification, what  
5 happens then?

6 A. Once it passes certification, it is put into  
7 production, and they are certified to actually run a  
8 product.

9 Q. What are the things that the customer is primarily  
10 looking for when it makes a decision to purchase an airplane  
11 assembly machine like you are describing?

12 A. What a customer is looking for, number one, is  
13 throughput. Throughput, quality, reliability, are all key  
14 criteria that they are looking for.

15 Q. Why do they care about those things?

16 A. Because there are penalties, and their reputations  
17 are all at stake. If Boeing -- for example, if Spirit does  
18 not deliver their fuselage assemblies on time, they get a  
19 lot of help from Boeing, and there are penalties associated  
20 with late delivery.

21 Q. Monetary penalties?

22 A. Monetary as well as damage to their reputation.

23 For example, for certain components, they have a  
24 five-hour tack time. Meaning that every five hours the  
25 product has to move down the line.



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1           If we have a machine down situation, let's say  
2   it takes an hour, that's 20 percent of the downtime, there  
3   are five outages across multiple machines, you are one part  
4   behind on one shift.

5   Q.       When you say one part, what do you mean?

6   A.       One component, one subassembly. And you need all the  
7   subassemblies in order to feed the lines at the end of the  
8   day.

9   Q.       Mr. Benczkowski, what kind of aircraft are made in  
10   the United States using Broetje machines?

11   A.       Basically all commercial aircraft and private  
12   aircraft. We have the 747. We have the 787. We have 737.  
13   We have the C17. We have Gulfstream, various models of  
14   Gulfstream product as well, G650 being the most recent.

15   Q.       What kinds of prices does Broetje charge on this  
16   machine?

17   A.       The machine ranges, as you saw on the video, the  
18   smaller ones are about 5 million dollars. The larger  
19   machine might be up to 13 million dollars.

20   Q.       You mentioned earlier a couple of different kinds of  
21   fastener feed systems. What is a vibratory bowl?

22   A.       There are a multiple of systems. A vibratory bowl  
23   feed system is a very, very popular system. Pour a bag of  
24   rivets into a bowl and it vibrates around the bowl until  
25   they exit the top.

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1                   When it gets to the top, there is usually a  
2 track, so unlike the testimony you heard testimony where a  
3 bowl is slower than a receptor. That is not true, because  
4 in production there is a little escapement track and  
5 passengers are lined up and dispensing, similarly, just like  
6 they are in a cassette.

7       Q.       Has Broetje sold any of its machines with vibratory  
8 bowls?

9       A.       Yes.

10      Q.       How many?

11      A.       A handful.

12      Q.       Could you tell us when was the last time?

13      A.       It was probably late eighties.

14      Q.       What about hoppers?

15      A.       Hoppers are another fastener feed system. They are  
16 quite popular in certain facilities. We offer hoppers as an  
17 alternative in a fastener feed system.

18                   If you go into certain facilities -- for  
19 example, I spent a lot of time at Boeing Brighton, and they  
20 have 18 machines from ElectroImpact, ten of which have been  
21 delivered over the last five years, which have hopper type  
22 feed systems.

23      Q.       Which company is that?

24      A.       That was from ElectroImpact.

25      Q.       I am curious, do you visit facilities for Boeing and

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1 Spirit periodically?

2 A. Regularly, yes.

3 Q. How often do you see machines that are still using  
4 vibratory bowls or hoppers?

5 A. Always. They are still in use, regular use.

6 Q. Could you give a few examples?

7 A. Yes. If you walk into say the Spirit facility, you  
8 are going to see machines with hoppers. You are going to  
9 see machines with bowl feeders. You are going see machines  
10 with drop tube stations on them that are manually indexed.

11 If you go into a Boeing Everett facility, you  
12 are going to see ElectroImpact cassettes being used on the  
13 Spire machines, of which there are at least four.

14 Q. Is this, PTX-507, an ElectroImpact cassette?

15 A. Yes, it is.

16 Q. Is this what you were talking about being in use  
17 today?

18 A. In the Everett facility and also at the what were on  
19 the C17.

20 Q. I would like to talk some more about the customers.  
21 Could you describe the level of sophistication of your  
22 customers?

23 A. They are highly sophisticated. Normally, when we are  
24 in discussions with the customers, you are going to have a  
25 project engineer, a project manager. Then you are going to

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1 have specialists from the facilities group. You are going  
2 to have the mechanical engineering group. Controls group.

3 There will be a process specialist involved. A  
4 quality assurance specialist involved.

5 The process is very, very detailed. As a matter  
6 of fact, we are in discussion on a system right now, and we  
7 went as far as to have to provide the length of the tube  
8 inside the rivets so that Boeing could calculate how heavy  
9 that cassette would be in case it had to lift it up over  
10 their head to load it so it doesn't violate ergonomic  
11 constraints.

12 Q. Obviously, we are here in a lawsuit against F2C2 and  
13 AHG. Is F2C2 a competitor of Broetje?

14 A. No, F2C2 would not be a competitor to Broetje.  
15 Broetje builds automated fastening machines and systems.  
16 They provide a subsystem that could be integrated into any  
17 automatic fastening machine. There would be a supplier,  
18 such as someone who would buy a bowl system or the like.

19 Q. Is AHG a competitor?

20 A. AHG would not be a competitor of Broetje. AHG, I  
21 believe, sells fasteners. We sell machinery that installs  
22 fasteners.

23 Q. Who are Broetje's competitors?

24 A. Broetje's competitors are primarily Gemcor and  
25 ElectroImpact.

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1 Q. Does Gemcor have a particular market niche?

2 A. Yes. Gemcor fits into a specific market niche where  
3 they have more or less the lower cost market. I would say  
4 if I would own a piece of equipment, they would tend to sell  
5 machines in a market where we can't compete.

6 Q. Why not?

7 A. It would be too expensive. For example, if they were  
8 awarded a contract which we were not even invited to bid  
9 just because then our price is going to be higher, that was  
10 for a project which was for the off-load of what's called  
11 the window belt at Boeing, where they are basically using a  
12 Broetje machine right now to install those fasteners. They  
13 offered it to a small company with a limited budget, say  
14 about three million dollars, they would work the contract.  
15 We were not invited to bid because we could not make a  
16 machine for 3 million dollars.

17 Q. ElectroImpact, do they have a particular market  
18 niche?

19 A. Yes. They are known more or less as the "college  
20 whiz kids," so that if you were to -- a lot of young people  
21 out of college, very creative, very innovative, so if you  
22 were to basically draw an analogy with automotive companies  
23 or models, you would say that Gemcor is the Chevy Cruze,  
24 ElectroImpact is the Volt, and we would be the Mercedes in  
25 this industry.

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1 Q. Have you heard a company called Kuda?

2 A. Yes. Kuda --

3 Q. Let me ask a question. We heard yesterday about an  
4 opportunity where there was consideration of whether Kuda  
5 would buy Broetje's automatic fastener feed system. Can you  
6 tell us what happened there?

7 A. Yes. I was actually contacted directly by Kuda to  
8 provide a location for a fastener feed system.

9 Q. Did you do that?

10 A. Yes, we did. We gave them a premium price.

11 Q. Why is that?

12 A. Well, because it involves a lot of know-how. You  
13 just don't take one of these fastener feed systems and plug  
14 it into a machine and expect it to work. You need to  
15 integrate it. We charged a healthy fee to integrate it.

16 Q. What did they do in response to that price offer?

17 A. They basically rejected our offer, and as you heard,  
18 they selected F2C2 as the supplier.

19 Q. Then what happened next?

20 A. Well, the project was actually, had many, many  
21 issues, and Spirit ended up canceling the contract with  
22 Kuda.

23 Q. Then what happened after that?

24 A. After that Broetje was awarded the machine to build  
25 the 787 equipment.

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1 Q. I would like to know, could you please identify what  
2 is DTX-1223B? I'm holding it here.

3 MR. KELLEHER: May I approach, Your Honor?

4 THE COURT: You may approach.

5 THE WITNESS: This is a Broetje cassette.

6 BY MR. KELLEHER:

7 Q. This one has rivets in it?

8 A. This one has rivets in it.

9 Q. What is this in the back, the upper right hand  
10 corner?

11 A. We call that the separator.

12 Q. When did you first see one of these?

13 A. I first saw the metal cassette when I was employed by  
14 Par in about 2005. We had installed a machine at Triumph,  
15 which was then Vought, in Dallas. And I was going to  
16 basically meet with the executive management for the  
17 demonstration, that they were happy with the machine we just  
18 installed.

19 Q. When you saw it, did you recognize what it was?

20 A. Well, I was walking down the floor, and going to the  
21 office. When I saw the rack with the metal cassettes in it,  
22 I stopped and said, What's that?

23 Q. What did you hear?

24 A. Well, I was basically told that from --

25 MR. CAHR: Objection, Your Honor. Calls for

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1 hearsay.

2 MR. KELLEHER: It is not for the truth. It is  
3 merely for what other people said.

4 THE COURT: Don't tell us exactly what was said.  
5 Just tell us what you recall generally.

6 THE WITNESS: What I recall generally is I saw  
7 the metal cassette and I thought that that was good.

8 BY MR. KELLEHER:

9 Q. Why was that good?

10 A. Well, because the other plastic version just seemed  
11 flimsy.

12 Q. When you say the plastic version, what do you mean?

13 A. The original AHG version that was provided in the  
14 past that you would see, such as Spirit.

15 Q. I notice that this Broetje cassette, it has the  
16 Broetje label here on the front. Why does it have that?

17 A. It is there to identify that it's manufactured by  
18 Broetje.

19 Q. We see some other cassettes that say F2C2 and AHG in  
20 the middle. Why does ours not say that?

21 A. Because it's not manufactured by AHROA CT.

22 Q. Why is ours made of metal?

23 A. Because it is an industrial environment, it is more  
24 sturdy. These guys manhandle things. So they have to be  
25 durable.



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1 Q. What color tape does Broetje use to coil up the tubes  
2 in its cassettes?

3 A. Broetje uses a clear type.

4 Q. Why not a color?

5 A. Well, color tape is really no longer necessary. That  
6 color tape is solser (phonetic), there is a whole language  
7 in this business. The colors designate different fastener  
8 diameters. The movie you saw, you saw a model that has that  
9 Fastener 5 diameter. Dash 5 is a red. Then there is a  
10 blue, there is a green. And if we were to put colors in our  
11 cassettes for the round tubes that were just previously  
12 discussed, those would be either yellow -- white or brown  
13 because those are for larger diameter fasteners. That is  
14 why the tube is bigger.

15 Q. There is a handle here on the front. Why is there a  
16 handle?

17 A. There is a handle there so you can create it and  
18 insert it into the workstation from the loading station.

19 Q. There are not any physical counters on the front,  
20 number counters on the front of the cassette. Why not?

21 A. We don't use it. Just like we don't use the color  
22 tape, because our systems are used in an automated system.  
23 So when we load that cassette, we put all the data on that  
24 clip that is on the back that tells you what the fastener  
25 style is, how many are in there, where it is located. As

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1 the machine reads that information, it automatically  
2 subtracts all the time.

3 Q. Is this the component you are talking about here?

4 A. On the back, the little white disk, yes.

5 Q. Okay. So we pointed to this a moment ago. Why is  
6 this on the inside, this escape mechanism?

7 A. The escape is on the inside because that is where we  
8 felt it was best placed and most effectively escapes the  
9 ribbon.

10 Q. And this knob here that comes off for the rivets to  
11 go into the cassette, I notice it's not held by a metal  
12 chain. Why not?

13 A. Well, the chain was always the problem. It would  
14 always break. So that is why we had the threaded portion  
15 next to it. You screw it on, that's where it stays. It  
16 doesn't get lost.

17 Q. I notice the bottom is metal as well. Why is that?

18 A. It's, again, for sturdiness. You are an industrial  
19 environment.

20 Q. But the top is clear. How come?

21 A. The top is clear so that you could check to see if  
22 there are fasteners in it, if you have a problem with  
23 anything in that coil.

24 Q. Is there any reason in particular besides for the  
25 size and shape of the cassette?

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1 A. It has to be convenient to handle. It has to be  
2 carried and inserted into the machine. The square shape  
3 basically nicely packages the circular tube.

4 Q. Okay. How many customers have you personally told if  
5 we are selling F2C2 cassettes?

6 A. I have never told anyone we are selling F2C2  
7 cassettes.

8 Q. How many customers have asked you if we are selling  
9 F2C2 cassettes?

10 A. No customers have ever asked us if we are selling  
11 F2C2 cassettes.

12 Q. In the industry, is there any common knowledge  
13 concerning this dispute that is going on here today?

14 A. Yes. It is known in the industry that this dispute  
15 is ongoing.

16 Q. What kind of documentation does Broetje provide to  
17 its customers about the cassettes?

18 A. We typically provide information related to where  
19 it's built, what it is constructed of.

20 Q. Will you please look to Exhibit No. 1137, DTX-1137 in  
21 your book?

22 A. Okay.

23 Q. Could you tell us what this is?

24 A. This is a budgetary proposal to a former buyer at --

25 Q. I'm sorry, Mr. Benczkowski. 1137.

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1 A. 1137. I'm sorry. Wrong tab. I'm sorry.

2 Okay. This is basically what we call the  
3 delivery note.

4 MR. KELLEHER: Your Honor, I'd like to offer  
5 this into evidence.

6 MR. HOROWITZ: No objection, Your Honor.

7 THE COURT: It's admitted.

8 (DTX-1137 is admitted into evidence.)

9 BY MR. KELLEHER:

10 Q. So, Mr. Benczkowski, can you explain what this is for  
11 the jury?

12 A. Yeah. So we call it a delivery note, but most people  
13 would identify it as a packing slip. This is actually  
14 telling us that it's going to Vought Aircraft. It is --

15 Q. And where is Vought?

16 A. Vought is in Dallas, Texas.

17 Q. Does this document have a date?

18 A. Yes, it does. It's basically 10/29/2004.

19 Q. So that is October 2004?

20 A. Correct.

21 Q. And what does it say is being delivered?

22 A. It says that seven rivet cassettes are being  
23 manufactured. They're manufactured of aluminum and plastic,  
24 and the manufacturer was Broetje Automation. The country of  
25 origin was Germany, and the harmonized tariff schedule, that

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1 is the HTS number, is as you see stated there.

2 Q. When does the customer get this?

3 A. When did the customer get this?

4 Q. Yes. When would the customer get this?

5 A. This is what is in the packing information that goes  
6 with it. So at the time of delivery he would get this.

7 Q. Could you please look at Exhibit PTX-387 in your  
8 book?

9 A. All right.

10 Q. Could you tell us what this is, briefly?

11 A. Yes. This is basically a delivery note and this one  
12 is going to Boeing.

13 MR. KELLEHER: Your Honor, I would offer this  
14 into evidence.

15 MR. HOROWITZ: Your Honor, I should have made  
16 this objection to the last one, but that horse left the  
17 barn.

18 There needs to be some foundation laid with this  
19 witness before you can just offer it into evidence other  
20 than identifying it.

21 THE COURT: Mr. Kelleher.

22 MR. KELLEHER: I can ask the questions.

23 THE COURT: All right

24 BY MR. KELLEHER:

25 Q. Mr. Benczkowski, when Broetje ships a rivet

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1 cassette to a customer in the United States, what kind of  
2 documentation comes with it?

3 A. Documentation just as you see here.

4 Q. What is the purpose of the documentation?

5 A. It is to let them know where the -- what is included  
6 in the shipment, where it comes from, and what the HTS or  
7 the harmonized code number is.

8 Q. And who prepares this kind of document?

9 A. This is prepared by our shipping department.

10 Q. Is it prepared in the ordinary course of business?

11 A. It is normal course of business, yes.

12 Q. Is it the practice of this company to keep this  
13 document?

14 A. It is.

15 MR. KELLEHER: I would offer 387 into evidence,  
16 Your Honor.

17 MR. HOROWITZ: Your Honor, I'm going to renew my  
18 objection. This is 2005, before he is at the company. This  
19 is Broetje Germany, not Broetje USA.

20 MR. KELLEHER: Your Honor, you actually  
21 overruled this objection yesterday.

22 THE COURT: I'll overrule it again. The  
23 document is admitted.

24 (DTX-387 is admitted into evidence.)

25 BY MR. KELLEHER:

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1 Q. So, Mr. Benczkowski, could you tell us what is shown  
2 on this document?

3 A. Which one is this?

4 Q. 387.

5 A. Okay. Yes. What is shown is that it was, this is a  
6 shipment going to the Boeing Company in Macon, Georgia --  
7 excuse me. I'm sorry. (Clearing throat.) -- basically in  
8 November 10th of 2005. And it states the fastener, four  
9 fastener cassettes or rivet cassettes made of  
10 aluminum/plastic, combination were manufactured by Broetje  
11 in Germany. And the harmonized code number is there.

12 It also says that it has tubing, made of  
13 plastic, also supplied by Broetje in Germany and also the  
14 code.

15 Q. Mr. Benczkowski, we'll move on to the next one.  
16 Could you please look at Exhibit 380?

17 A. (Witness complies.)

18 Q. Could you tell us briefly what this is?

19 A. Okay. This is a similar shipping document or  
20 delivery note that is going to Spirit Aerosystems in  
21 Wichita, Kansas.

22 MR. KELLEHER: Your Honor, I would offer 380  
23 into evidence.

24 MR. HOROWITZ: No objection, Your Honor.

25 THE COURT: It's admitted.

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1 (DTX-380 is admitted into evidence.)

2 BY MR. KELLEHER:

3 Q. So, Mr. Benczkowski, could you look forward, I'm  
4 sorry, to page -- I'm sorry, you don't have to look forward  
5 at all -- the very first item on the shipping note and tell  
6 us what is shown there?

7 A. The very first item says 10 fastener cassettes made  
8 of steel. Manufacturer Broetje, country of origin Germany.

9 Q. What is the date on this document?

10 A. The date of this document is 11/23/2006.

11 Q. And which customer is this?

12 A. This is Spirit Aerosystems in Wichita, Kansas.

13 Q. Why don't we look at one more of these,  
14 Mr. Benczkowski. Could you look at PTX-398? I'm sorry.  
15 394.

16 A. (Witness complies.) Okay.

17 Q. Could you tell us very briefly what this is?

18 A. Yes. This is the same shipping document for items  
19 shipped to Gulfstream Aerospace in Savannah, Georgia.

20 MR. KELLEHER: Your Honor I would offer PTX-394  
21 into evidence.

22 MR. HOROWITZ: No objection, Your Honor.

23 THE COURT: It's admitted.

24 (PTX-394 is admitted into evidence.)

25 BY MR. KELLEHER:



Benczkowski - direct

1 Q. So, Mr. Benczkowski, could you please explain what is  
2 shown in this document?

3 A. This was a shipment that took place in April 16th of  
4 2008. It identifies that we're shipping some upper anvils,  
5 which are made of steel, which are a tool on the machine.  
6 Country of origin. It's stating we have grippers that are  
7 made of steel.

8 Q. Mr. Benczkowski, for this one, why don't we turn  
9 forward to page dot 4.

10 A. (Witness complies.)

11 Q. And could you tell us what is the fourth item shown  
12 on this page?

13 A. It's showing that each fastener cassette, mixed  
14 material from Broetje Automation, country of origin Germany,  
15 were shipped to Gulfstream.

16 Q. So we have seen shipping documents for Boeing,  
17 Spirit, Vought, and Gulfstream. Has Broetje Automation  
18 sold any of its Broetje brand metal cassettes to any other  
19 customers in the United States?

20 A. No.

21 Q. Could you please look at DTX-1136?

22 A. (Witness complies.)

23 Q. Very briefly, could you tell us what this is?

24 A. Yes. This is a proposal, a budgetary proposal to,  
25 at the time it was Boeing Wichita, now it is Spirit

Benczkowski - direct

1     Aerosystems.

2     Q.     Is this the kind of document that is prepared in the  
3     ordinary course of business?

4     A.     Yes, it is.

5     Q.     Is it prepared around the time around March 2005?

6     A.     Yes.

7     Q.     Who would prepare this kind of document?

8     A.     This would be prepared by our sales office in  
9     Germany.

10    Q.     Would it be kept in the ordinary course of business?

11    A.     Yes, it would.

12                 MR. KELLEHER: Your Honor I would offer into  
13    evidence, DTX-1136.

14                 MR. HOROWITZ: No objection.

15                 THE COURT: It's admitted.

16                 (DTX-1136 is admitted into evidence.)

17    BY MR. KELLEHER:

18    Q.     So, Mr. Benczkowski, could you tell the jury what is  
19    shown by this document?

20    A.     Yes. This is basically a document that is submitted  
21    for planning purposes. So every year, our customers come to  
22    us for a number of budgetary quotes so they can establish  
23    their financial plans for the following year.

24    Q.     And what is shown on the second page?

25    A.     The second page is showing that we have the fastener

Benczkowski - direct

1 cassette and it is identifying the Broetje-build fastener  
2 cassette.

3 Q. What does that mean Broetje-build?

4 A. It means it is manufactured by Broetje Automation.

5 It is also showing we have various price  
6 structures and price discounts for varying quantities.

7 Q. Mr. Benczkowski, could you turn now to Exhibit 1135?

8 And I will go slow on this one.

9 A. (Witness complies.)

10 Q. Could you tell us what this is?

11 A. Yes.

12 Q. Very briefly.

13 A. Yes. This is an e-mail from Laura Ballard.

14 Q. Who is Laura Ballard?

15 A. Laura Ballard is our spare parts engineer at Broetje  
16 Automation. She is basically the focal point for the  
17 request for information and supply of quotes back out into  
18 the marketplace.

19 Q. And who is Ms. Ballard talking to in these e-mails?

20 A. She is talking with a Mr. Dana Hamilton who at that  
21 time was employed at Vought.

22 Q. Is that part of her ordinary business  
23 responsibilities to communicate with customers?

24 A. Yes.

25 Q. Does she make records of those communications?

Benczkowski - direct

1 A. Yes, all records are recorded and maintained in the  
2 file.

3 Q. And does she make these records at around the time  
4 indicated on the document?

5 A. Yes.

6 MR. KELLEHER: Your Honor, I would offer into  
7 evidence DTX-1135.

8 MR. HOROWITZ: Your Honor, I would make the same  
9 objection I made yesterday morning.

10 THE COURT: All right. Overruled. It is  
11 admitted.

12 (DTX-1135 is admitted into evidence.)

13 BY MR. HOROWITZ:

14 Q. So, Mr. Benczkowski, can you tell us what is shown on  
15 the first page of this document?

16 A. The first page of the document is basically the  
17 e-mail that is from Laura Ballard to Dana Hamilton. And she  
18 is --

19 Q. Who is Dana Hamilton?

20 A. Dana Hamilton is a maintenance lead that was at  
21 Vought Aircraft in Dallas, Texas.

22 Q. Okay. And so she is saying Hello, Dana. Here's what  
23 we have for F2C2.

24 And the contact is Dominique Hage; correct?

25 A. Correct.

Benczkowski - direct

1 Q. Hopefully, Dominique should be able to help you or  
2 find someone who can. Do you see that?

3 A. Yes.

4 Q. Why is she saying that?

5 MR. HOROWITZ: Objection, calls for speculation.

6 THE COURT: Overruled. You can answer if you  
7 know.

8 THE WITNESS: I can answer it. Yes, Your Honor.  
9 Thank you.

10 BY THE WITNESS:

11 A. She is saying that because we had received a request  
12 from this particular customer asking us for some spare parts  
13 for an F2C2 fastener feed system. And we, of course, do not  
14 stock or store fastener feed components so we contacted  
15 F2C2. They would not sell to us so we passed on the contact  
16 information to the customer, to Mr. Dominique Hage so that  
17 a customer that has a rack could actually maintain his  
18 equipment.

19 Q. Could we turn to the second page?

20 A. (Witness complies.) The second page is blank. The  
21 third page.

22 Q. I'm sorry. I believe the third page.

23 A. (Witness complies.)

24 Q. Could you tell us what is shown here?

25 A. Yes, this is another e-mail from a Laura Ballard to a

Benczkowski - direct

1 Barbara Dean who is a buyer at Spirit Aerosystems.

2 Q. And why was this e-mail being sent?

3 A. Well, this is being sent to inform Barbara also that  
4 we have no access to the F2C2 components and that they  
5 should go directly to F2C2 for those parts.

6 Q. Could you please turn to page 5?

7 A. (Witness complies.)

8 Q. Could you tell us what is shown here on page 5?

9 A. Yes. This is also an e-mail from Laura Ballard to  
10 Daniel Rinke. Daniel Rinke was a planner on the 787 program  
11 with Spirit Wichita, Kansas.

12 Q. And why was this e-mail sent?

13 A. It basically was to inform Daniel that we had no  
14 access to the F2C2 parts. We didn't know where any  
15 distributors were, and the contact information at F2C2 AHG  
16 said they could fulfill their need directly.

17 Q. Could you turn to the last page?

18 A. (Witness complies.)

19 Q. What is shown here?

20 A. This is basically the e-mail from Laura Ballard again  
21 to Daniel Rinke advising him that we can't supply cassettes.  
22 To go directly to F2C2.

23 Q. Mr. Benczkowski, you can put that exhibit aside.

24 There is actually a dispute in this case about  
25 how many Broetje cassettes have been sold in the United

Benczkowski - direct

1 States. Are you familiar with any documents that have been  
2 prepared to show the number of spare cassettes that have  
3 been sold?

4 A. Yes, I'm very familiar with it.

5 Q. When I say spare cassettes, what do I mean?

6 A. By spare cassettes, you mean those that are basically  
7 supplied after the equipment is in production, not part of  
8 the original equipment order.

9 Q. Could you look at Exhibit 1887? DTX-1887.

10 A. Okay.

11 Q. Do you recognize this document?

12 A. Yes. This is a document --

13 Q. Let me ask, do you know how it was prepared?

14 A. Yes, this was prepared at my direction by Laura  
15 Ballard.

16 Q. Do you know, what is this document intended to show?

17 A. This is intended to provide the total of spare  
18 cassettes that were sold in the United States.

19 Q. And how did Ms. Ballard create this document?

20 A. This document was created through polling of our  
21 enterprise system, which we call it the AMS system. So  
22 it's how we handle our business documents. So I'll order  
23 entries. All appeals, all shipments, all cost data is all  
24 recorded into the system, and we can basically retrieve that  
25 information by part number description and other means.

Benczkowski - direct

1 MR. KELLEHER: Your Honor, I would like to offer  
2 into evidence DTX-1187.

3 MR. HOROWITZ: No objection, Your Honor.

4 THE COURT: It's admitted.

5 (DTX-1187 is admitted into evidence.)

6 BY MR. KELLEHER:

7 Q. So, Mr. Benczkowski, could you explain what is shown  
8 on this sheet?

9 A. Yes. What is shown on this sheet is basically, if  
10 you start in the left-hand corner, basically the first one  
11 is the drawing number, and that is the unique identifier  
12 for the particular cassette. Then you have a description  
13 which identifies the diameter. How many we have sold is the  
14 quantity. UOM is the unit of measure. The price that we  
15 have before discount, because our customers based on volume,  
16 is entitled to some level of discount. Then what the total  
17 price of the contract was.

18 Then we have an order number which is the order  
19 number from the customer, who the customer was, the date  
20 that we shipped it, and then in the blue or some of the  
21 colored columns, you will see that we have the shape of the  
22 actual tube. And then, of course, our reference project  
23 number as it goes over to Germany.

24 Q. And I see there is a category called ROS. Do you  
25 know what that is?



Benczkowski - direct

1 A. Yes, that is Return On Sales. Okay? And then our  
2 profit. Return on sales is the terms of the percentage  
3 profit in terms of dollars.

4 Q. And I see a ROS, and a (BAO) underneath it?

5 A. Yes, Broetje is Broetje Automation. We were located  
6 in Omaha previously, so that is a reference.

7 Q. So that is Broetje USA?

8 A. That is Broetje USA.

9 Q. And then at the end it says ROS (BAW)?

10 A. Yes, that stands for Broetje Automation, Wiefelstede,  
11 Germany.

12 Q. There is a column that says shape. The first one  
13 says pentagonal, and there then there is five that says  
14 round?

15 A. Correct.

16 Q. What does that mean?

17 A. That is basically defining the interior, the ID  
18 configuration of the tube in a cassette.

19 MR. KELLEHER: Your Honor, may I approach?

20 THE COURT: You may.

21 BY MR. KELLEHER:

22 Q. I would like to show you what is marked as Exhibit  
23 DTX-1223D.

24 A. This is a Broetje cassette with the round tube.

25 Q. What do you mean by a round tube?

Benczkowski - direct

1 A. The round tube means it has no shape, no form shape  
2 inside. It's not a soft pentagon. It's just a round tube.

3 Q. Could you show it to the jury?

4 A. (Indicating.)

5 Q. There appears to be some kind of fiber or  
6 reinforcement in the tubing; is that right?

7 A. Yes. The tube is reinforced externally so as it is  
8 coiled, it won't kink.

9 Q. Thank you.

10 THE COURT: Mr. Kelleher, are you nearly done  
11 with your examination.

12 MR. KELLEHER: I am. Have I offered it into  
13 evidence?

14 THE COURT: I'm not sure. Offer it again to be  
15 sure.

16 MR. KELLEHER: Your Honor, if I could offer it  
17 into evidence, DTX-1223D.

18 MR. HOROWITZ: No objection, Your Honor.

19 THE COURT: Okay. It's admitted.

20 (DTX-1223D is admitted into evidence.)

21 THE COURT: Do you have more for this witness?

22 MR. KELLEHER: Just about two questions, Your  
23 Honor.

24 THE COURT: Okay.

25 MR. KELLEHER: Can we go to the very bottom of

Benczkowski - direct

1 this document?

2 BY MR. KELLEHER:

3 Q. There is a box in green here, Mr. Benczkowski. Could  
4 you tell us what this means?

5 A. The box in green says there are a total number of  
6 spare cassettes sold over this time period of 220. And of  
7 that 220, the very next slide, they're, of round shape  
8 there is 132. So that means there are basically 88 that are  
9 remaining that are of our soft pentagon configuration.

10 MR. KELLEHER: Thank you, Mr. Benczkowski.

11 I have no more questions, Your Honor.

12 THE COURT: All right. Thank you. It's a good  
13 time to give the jury their break this morning. No talking  
14 about the case during the break, and we'll get you back here  
15 shortly.

16 (Jury left courtroom.)

17 THE COURT: We will be in recess.

18 (Brief recess taken.)

19 \* \* \*

20 (Proceedings reconvened after recess.)

21 THE COURT: Bring the jury in.

22 (Jury returned.)

23 THE COURT: Welcome back.

24 Mr. Horowitz, you may proceed.

25 MR. HOROWITZ: Thank you.

Benczkowski - cross

1 CROSS-EXAMINATION

2 BY MR. HOROWITZ:

3 Q. Good morning, Mr. Benczkowski.

4 A. Good morning.

5 Q. You told the jury that AHG and F2C2 are not  
6 competitors of Broetje. Correct?

7 A. Correct.

8 Q. But Gemcor is, is it not?

9 A. Correct.

10 Q. In fact, you worked at Gemcor, the main competitor to  
11 Broetje, for about 20 years. Right?

12 A. Correct.

13 Q. And you told the jury that working at Gemcore, that's  
14 like driving I think you said a Chevrolet Cruze. Is that  
15 right?

16 A. Correct.

17 Q. And you said that working for Broetje is like a  
18 Mercedes, a Mercedes Benz. Right?

19 A. Yes.

20 Q. So you traded in your Chevy for a Mercedes when you  
21 went from Gemcor to Broetje. Right?

22 A. That's accurate, yes.

23 Q. When you upgraded, you said you don't use AHG-F2C2  
24 cassettes. Right?

25 A. Correct.

Benczkowski - cross

1 Q. But you got to Broetje USA -- was it 2006 or 2008?

2 A. 2006.

3 Q. That's when Broetje USA first started. Right?

4 A. Correct.

5 Q. So in 2006, the cat was out of the bag. Right? AHG  
6 and F2C2 had parted ways. Right?

7 A. Yes.

8 Q. So, of course, customers weren't requesting AHG and  
9 F2C2 secrets from you because you weren't providing them at  
10 that time. Right?

11 A. I don't think that is really the decision point. I  
12 would argue that the decision point is the reliability of  
13 the equipment. Remember, what a customer is buying from us  
14 is throughput.

15 Q. Sir, I didn't ask you for a decision point for  
16 argument. I asked you to answer my question. Isn't it true  
17 that in 2006 Broetje and F2C2 and AHG were no longer doing  
18 business? Isn't that correct?

19 A. That's correct.

20 Q. You were not at Broetje in 2003 when they designed  
21 their cassette, were you?

22 A. No, I wasn't.

23 Q. In fact, that happened in Broetje Germany. Right?

24 A. Yes, it did.

25 Q. You don't work for Broetje Germany. You work Broetje

Benczkowski - cross

1 USA?

2 A. Broetje USA is a subsidiary of Broetje Germany.

3 Q. Very well. You answer to the folks in Germany.

4 Right?

5 A. Correct.

6 Q. Even though you weren't at Broetje Germany in 2003  
7 when this cassette was designed, you told the jury about the  
8 reason for the size and shape of the Broetje cassette, did  
9 you not?

10 A. Yes.

11 Q. If we could pull up JTX-14, please. This is in  
12 evidence, in fact, JTX-14.17 and 14.18.

13 Sir, you have been sitting through this trial as  
14 the corporate representative. Right?

15 A. Correct.

16 Q. You saw the testimony so far about these documents.  
17 Right?

18 A. Yes.

19 Q. And you saw Mr. Peters describe that these are the  
20 two documents -- well, this one slide deck and these two  
21 slides from this slide deck, JTX-14.17 and 14.18, you saw  
22 Dr. Peters testify that JTX-14.17 and JTX-14.18 are the  
23 internal Broetje development documents where they used AHG  
24 and F2C2's cassette as an example. Correct?

25 A. No, I don't believe he said that. He said that they

Benczkowski - cross

1       were internal documents for training.

2       Q.       Isn't it true that Dr. Peters said that these were  
3       the documents where they used the AHG cassette as an  
4       example?

5       A.       I did not hear him say that. I heard him say that  
6       those were documents used for training.

7       Q.       You believe these are training documents?

8       A.       They are used for -- we are a provider of machine  
9       tools. And if we have subsystems of various types, whether  
10      they are similar or not, there is some awareness that has to  
11      be made to the various employees. So that could be a  
12      training document. That could be an instructional document.

13      Q.       You weren't there, were you, sir?

14      A.       I was not there, sir.

15      Q.       Would you defer to the designated corporate  
16      representative who was put up by your company in Germany to  
17      talk about these documents? Would you defer to him?

18      A.       I would defer to him, yes.

19      Q.       So the jury's recollection as to what he said is what  
20      is said. Right? You would defer to Dr. Peters?

21      A.       I would defer to Dr. Peters.

22      Q.       Now, when you joined Broetje, and upgraded to the  
23      Mercedes, the Mercedes has team colors, does it not?  
24      Broetje has colors?

25      A.       Yes, it does.

Benczkowski - cross

1 Q. It's got corporate colors. Right?

2 A. Yes, it does.

3 Q. The corporate colors are red and black?

4 A. Yes.

5 Q. You showed the jury a video, a very impressive video.

6 Do you recall doing that?

7 A. Yes.

8 Q. And in that videotape, the corporate colors red and  
9 black are pretty prominent, are they not?

10 A. Yes.

11 Q. If we could pull up PDTX-122, this should be a screen  
12 shot. This was done in 2012. Right? July of 2012. Does  
13 that sound right?

14 A. Probably.

15 Q. If we could go to PDTX-121. These are the cassettes  
16 in July of 2012 that were shown in the video, were they not?

17 A. I believe so.

18 Q. If we could go to -- Mr. Benczkowski, I am pulling up  
19 the video that you showed the jury. Correct?

20 Broetje Automation, Composed to Compete. Do you  
21 see that there?

22 A. Yes.

23 Q. Is that Broetje's slogan, "Composed to Compete"?

24 A. Yes, it is.

25 Q. And when the jury saw this, there was very emphatic



Benczkowski - cross

1 music and a hard beat. Right?

2 A. Yes.

3 Q. It is a competitive company. Right?

4 A. Yes.

5 Q. And you have competitive colors, red and black.  
6 Right?

7 A. Yes.

8 Q. Let's go back to PDTX-121. You put the company  
9 colors on these cassettes in 2012. Right?

10 A. And earlier.

11 Q. Not when you first came out with the cassette, did  
12 you?

13 A. I believe when we first came out with the cassette  
14 that it had identification that it was Broetje --

15 Q. It did have identification, didn't it? Let's look at  
16 JTX-3.

17 MR. HOROWITZ: Your Honor, forgive me.

18 (Pause.)

19 MR. HOROWITZ: I am going to use instead  
20 DTX-1223B, since we can't find JTX-3. It's absconded.

21 BY MR. HOROWITZ:

22 Q. Mr. Benczkowski, there is no red logo, is there?

23 A. No, there is no red on it. But the red is  
24 meaningless. What we are selling that product to is a very  
25 highly educated customer that participates with us through

Benczkowski - cross

1 the whole process and knows that in significant detail.

2 This is not on a shelf in a Wal-Mart.

3 Q. I didn't ask you if it was on a shelf at Wal-Mart. I  
4 didn't ask you if you thought it had significance. My  
5 question simply was did Broetje put red on this logo. Yes  
6 or no?

7 A. No.

8 Q. But Broetje's logo -- could we go back to the screen  
9 shot with the logo --

10 That is Broetje's logo. Right?

11 A. That's Broetje's current logo. The logo that you  
12 were showing in that previous video had the meatball on the  
13 end of it and had AHG Controls. This all changed after we  
14 separated from CLAAS.

15 Q. You are testifying that that logo changed? Are you  
16 telling this jury that when this cassette came out that  
17 wasn't the company's logo, the red and black? Is that what  
18 you just said?

19 A. What I said was this is the current logo from 2012.

20 Q. Please pull up JTX-14 again.

21 Let's look at the first page of JTX-14.

22 Do you see the red and black?

23 A. Yes.

24 Q. It was red and -- that says June 23, 2003. Correct?

25 A. Exactly.

Benczkowski - cross

1 Q. Those were the company colors. Right?

2 A. Those are the company colors.

3 Q. In fact, when you were told by your company's lawyer,  
4 patent lawyer, that you had to redesign the cassette because  
5 of the French Court's opinion recently, this is what it  
6 looks like. Right? I am showing you PTX-0650. This is the  
7 redesign. Right?

8 A. That is a redesign that has not yet been introduced  
9 into the U.S. market.

10 Q. And you would agree with me that the company's logo  
11 is all over this cassette. Right?

12 A. It is prominent, yes.

13 Q. It is prominent. Right?

14 A. Yes.

15 Q. And the color of the cassette is actually red.  
16 Right?

17 A. It will be red, maybe.

18 Q. And it's got a red-and-black logo. Right?

19 A. It has a black-and-red logo, yes.

20 Q. That is not the same logo that was used when the  
21 cassette first came out in 2004-2005, is it?

22 A. No. It was the logo on the other cassette.

23 Q. No red in the logo. Right?

24 A. There was no red in the logo.

25 Q. Now, you told us you have some patents yourself.

Benczkowski - cross

1 Right?

2 A. Yes.

3 Q. You are familiar with the concept of proprietary  
4 information then. Right?

5 A. Yes.

6 Q. You are familiar with the concept of intellectual  
7 property. Right?

8 A. Yes.

9 Q. If somebody used your invention that you have  
10 patented without your permission, you would want to be  
11 compensated for that, wouldn't you?

12 A. Yes.

13 Q. Now, Broetje, as a company, understands the  
14 importance of proprietary information, too, does it not?

15 A. Yes, it does.

16 Q. Let's pull up, for example, JTX-8. This is a  
17 marketing presentation that you share with customers of  
18 Broetje USA. Correct?

19 A. Yes, it is.

20 Q. In fact, you stamp every page of this marketing page  
21 with that gigantic word "Proprietary" there. Do you see  
22 that?

23 A. Yes.

24 Q. It says, "This drawing and all information thereon is  
25 the property of Broetje Automation GMBH and is

Benczkowski - cross

1 confidential."

2 Did I read that correctly so far?

3 A. Yes.

4 Q. "It must not be made public or copied."

5 Did I read that correctly?

6 A. Yes.

7 Q. "Unless authorized by them and is subject to return  
8 upon demand."

9 Correct?

10 A. Yes.

11 Q. That is on every single one of these pages. Correct?

12 A. Yes.

13 Q. And the reason is you don't want people copying your  
14 proprietary information. Right?

15 A. The reason for such a document is so it is not  
16 distributed to competition once it's presented to a  
17 customer.

18 Q. The purpose of this proprietary sticker is to protect  
19 Broetje's intellectual property from being copied. Yes or  
20 no?

21 A. Yes.

22 Q. If you would turn to JTX-108.10 while we have this  
23 up, by the way.

24 That's an AHG and F2C2 cassette, is it not?

25 A. Yes, it is.

Benczkowski - cross

1 Q. In this presentation, you whited out, or somebody  
2 whited out AHG F2C2, did they not?

3 A. I can't speak to whether or not it was whited out or  
4 not.

5 Q. Well, you don't see it in the picture, do you?

6 A. No, I don't see it in the picture.

7 Q. So we can speak to it. The jury can see it. There  
8 is no AHG and F2C2 in that cassette, is there?

9 A. In that particular view, there is not.

10 Q. It's underneath the Broetje Automation sign. Right?

11 A. Yes.

12 Q. The red-and-black logo. Yes?

13 A. There would be various reasons for such a document.

14 Q. I didn't ask you that, sir. If you could answer my  
15 question. This is the Composed to Compete logo. Right?

16 A. No, that is not the Composed to Compete logo.

17 Q. That is what your videotape said, is it?

18 A. That is not the logo with Composed to Compete.

19 Q. You talked to the jury about round tubes. Do you  
20 recall that?

21 A. Yes.

22 Q. And you used an exhibit I would like to pull up,  
23 DTX-1887. You focused in this exhibit on the highlighted  
24 round. Right?

25 A. Yes.

Benczkowski - cross

1 Q. But the rest of the exhibit has the word Pentagon on  
2 it. Right?

3 A. Yes.

4 Q. And there is more pentagons than there are rounds.  
5 Right? Trust me, I did it before I asked you the question.

6 A. Well, there are more highlighted. You have to look  
7 at the quantities over on the left and multiply them.

8 Q. You see the word pentagon, or pentagonal?

9 A. Right.

10 Q. That is the shape of AHG and F2C2's tube, is it not?

11 A. I believe F2C2 and AHG's tube is a pentagon with  
12 grooves down the length of that.

13 Q. Who told you that? Where did you get that from?  
14 Have you done that research yourself?

15 A. We looked at the actual tubes.

16 Q. Who is "we"? Not you. Right?

17 A. No.

18 Q. You are not a technical expert, are you, sir?

19 A. No, I am not.

20 Q. You can't tell us whether these tubes infringe our  
21 patents, can you?

22 A. No, I can't.

23 Q. You don't see the words Soft Pentagon here, do you?

24 A. No. But that is an abbreviation for an XL  
25 spreadsheet in order to conserve space.

Benczkowski - cross

1 Q. Now you can answer my question. Do you see the word  
2 Soft Pentagon on the sheet of paper you talked to the jury  
3 about?

4 A. I do not see the word soft.

5 Q. Now, let's look at a couple of other documents you  
6 talked to the jury about.

7 Take a look at PTX-387.1.

8 A. Okay.

9 Q. You told the jury that this document meant that  
10 Broetje manufactured the cassettes that were sent to the  
11 company in Macon, Georgia, to Boeing. Right? That's what  
12 you told the jury?

13 A. Yes.

14 Q. This is dated, by the way, 10/11/2005. Right?

15 A. Yes.

16 Q. It's 11.10.2005.

17 Where were you working on November 10, 2005?

18 A. I was at Par Systems.

19 Q. You weren't working at Broetje?

20 A. I wasn't.

21 Q. By the way, this only says a quantity of four  
22 cassettes were sent. Right?

23 A. Yes.

24 Q. You actually didn't read the word -- we can play it  
25 back or I can go back to it -- but you said instead of



Benczkowski - cross

1 supplier for Broetje you said manufacturer. Do you recall  
2 saying that?

3 A. On some of these documents it says manufacturer and  
4 on some it says supplier.

5 Q. That is exactly right. Some of these say -- the  
6 documents take the trouble to make the distinction, do they  
7 not?

8 A. They should. But what's really of note here, this is  
9 a document, this is a shipping document.

10 Q. Sir, my question was, some documents say supplier and  
11 some say manufacturer?

12 A. If that's what it says, you are correct.

13 Q. We will show the jury, because we have another one  
14 that says manufacturer. But before we do that, supplier,  
15 that was Broetje's job. Right? When they would send out  
16 AHG and F2C2 cassettes, they did that as the supplier.  
17 Right?

18 A. Yes. We would do that as the supplier. But more so,  
19 I believe, I don't think we were very religious on whether  
20 it was supplier or manufacturer because they are buying a  
21 system from Broetje.

22 Q. You weren't there in 2005. You can't say that, can  
23 you, sir, who was religious and who wasn't? You weren't  
24 there?

25 A. I was not there in 2005, but the practice remains

Benczkowski - cross

1 unchanged.

2 Q. Were you there in 2005?

3 A. No, I was not there in 2005.

4 Q. This document says supplier. Right?

5 A. It says supplier. You are correct.

6 Q. And in 2005 AHG and F2C2 cassettes were still being  
7 supplied by Broetje. Correct?

8 A. Matter of semantics, but, yes.

9 Q. Let's look at the semantics on the Broetje document  
10 that you pointed out to the jury. Let's look at PTX-380.  
11 This is now a year later. Right? Now we are in November of  
12 2006.

13 A. Correct.

14 Q. Okay. This document doesn't say supplier, this says  
15 Broetje. This says manufacturer; right?

16 A. Yes.

17 Q. And by the way, it only says 10 cassettes; right?

18 A. Yes.

19 Q. Now, you talked to the jury about one more of these  
20 documents or maybe a couple more but I want to ask you about  
21 one in particular, DTX-1137.

22 A. Okay.

23 Q. Now, this document reflects a transaction you said  
24 between Broetje in Germany, because there is no Broetje USA  
25 at the time, and Vought in Dallas, Texas; correct?

Benczkowski - cross

1 A. Yes.

2 Q. Where were you working at this time?

3 A. I was working at Par.

4 Q. Okay. So you weren't there yet?

5 A. I was not there yet, no.

6 Q. But you told the jury that this -- well, let's forget  
7 what you told the jury. Let's just look at the document.

8 There is a purchase order on here, is there not?

9 A. There should be.

10 Q. Let's look at the top corner there.

11 A. Yes, there is.

12 Q. Okay. You can trace that purchase order number to  
13 see when it originated, could you not?

14 A. Yes.

15 Q. Let's do that. Let's go to DTX -- well, let me do  
16 this. Let me hand you ... (Pause.) I apologize. Okay.  
17 Here it is.

18 MR. HOROWITZ: Your Honor, the Court's  
19 indulgence, I'm sorry.

20 THE COURT: That's fine.

21 MR. HOROWITZ: I wasn't sure I was going to do  
22 this.

23 Your Honor, may I approach?

24 THE COURT: You may.

25 (Document passed forward.)

Benczkowski - cross

1 BY MR. HOROWITZ:

2 Q. Now, I have handed you DTX-1265.002. This is the  
3 date of this purchase order as March 17, 2003; correct?

4 A. Yes.

5 Q. Okay. And this is, by the way --

6 MR. HOROWITZ: Your Honor, may I publish to  
7 the jury while I examine on this document?

8 THE COURT: DTX-1265, the one you just handed  
9 the witness?

10 MR. HOROWITZ: Yes, .002.

11 THE COURT: Is there any objection?

12 MR. KELLEHER: No objection.

13 THE COURT: You may publish.

14 MR. HOROWITZ: Your Honor, I would also offer it  
15 into evidence.

16 THE COURT: Is there any objection to it?

17 MR. KELLEHER: No objection.

18 THE COURT: All right. It is admitted.

19 (DTX-1265.002 is admitted into evidence.)

20 BY MR. HOROWITZ:

21 Q. Now, this document in March of 2003 is three months  
22 before June of 2003; correct?

23 A. Yes.

24 Q. Okay. It's three months before the document that we  
25 were talking about before we had the dispute about what Dr.

Benczkowski - cross

1 Peters said the document meant; correct?

2 I'll keep it simple. March is three months  
3 before June; right?

4 A. Exactly.

5 Q. And this is the date that this purchase order  
6 originated. Let's go to the next document. Well, let's  
7 leave it up.

8 The next document I want to show you is  
9 DTX-1265.0051.

10 (Document passed forward.)

11 THE COURT: Do you plan to offer this one as  
12 well into evidence?

13 MR. HOROWITZ: I would like to offer it, please,  
14 Your Honor.

15 THE COURT: Is there any objection?

16 MR. KELLEHER: No objection.

17 THE COURT: All right. It is admitted.

18 (DTX-1265.0051 is admitted into evidence.)

19 BY MR. HOROWITZ:

20 Q. Now, this was the same purchase order in the upper  
21 corner; correct?

22 A. Correct.

23 Q. And, in fact, for this very same purchase order that  
24 you talked to the jury about, you see the 50 cassettes that  
25 were sent? Do you see that there?

Benczkowski - cross

1 A. Yes.

2 Q. It says country of manufacturer France; right?

3 A. That's what it says, yes.

4 Q. That's where F2C2 is located, in France; correct?

5 A. Yes, they are.

6 Q. Okay. And these are 50 cassettes that were sent to

7 Grand Prairie, Texas; correct?

8 A. That is correct. However --

9 Q. I didn't ask you for however. And you would agree  
10 with me that this is before October of 2004; correct?

11 A. It is before October of 2004.

12 Q. It's before the document you showed the jury with the  
13 seven cassettes; correct?

14 A. Yes, it is.

15 Q. Okay. And let's go back to DTX-1137.

16 A. I'm sorry. What was the number again?

17 Q. DTX-1137. That is the one that your counsel asked  
18 you about.

19 A. Okay.

20 Q. Now, again, this is seven cassettes where it says the  
21 manufacturer is Broetje Automation; right?

22 A. Yes.

23 Q. And it says aluminum/plastic; correct?

24 A. Yes.

25 Q. That doesn't tell you exactly how it's formed; right?

Benczkowski - cross

1 Aluminum/plastic. They're all made of aluminum/plastic;  
2 right?

3 A. What that is, that document is a shipping document.  
4 It is telling you according to the requirements of the  
5 harmonized tariff schedule that that is the information you  
6 require on a document to get it into the country.

7 There are meetings. We are involved with the  
8 customer much before this product shipped. He knows exactly  
9 what he is getting.

10 Q. Sir, you weren't there, were you?

11 A. I was not there but the rules haven't changed.

12 Q. You weren't there, were you?

13 A. I was not there, no.

14 Q. And to be clear, the document that we just went over,  
15 that I showed you, that your lawyer didn't show you when  
16 this sale originated, when cassettes were first sent to  
17 Texas, it was 50 AHG and F2C2 cassettes that were sent;  
18 correct?

19 A. I believe that what is on this document is a  
20 typographical error because previously, prior to this award,  
21 what was the first customer to get the Broetje cassette? So  
22 I would assume this to be a typographical error because they  
23 were accustomed to putting France down as the country of  
24 origin for this document.

25 Q. Let's put back up DTX-1265. I just want to make sure

Benczkowski - redirect

1 I'm getting this.

2 A. Um-hmm.

3 Q. Country of manufacturer, France; right?

4 A. Yes.

5 Q. Okay. 50 cassettes; right?

6 A. Yes.

7 Q. Okay. You weren't there; right?

8 A. I was not there.

9 Q. You didn't type the document?

10 A. I did not type the document.

11 Q. You don't know who typed the document?

12 A. I do not know who typed the document.

13 Q. But you know it says country of manufacturer, France;  
14 correct?

15 A. Yes, I know that.

16 Q. And AHG and F2C2 is located in France; correct?

17 A. Correct.

18 Q. And Broetje is located in Germany; correct?

19 A. They're located in Germany.

20 MR. HOROWITZ: No further questions, Your Honor.

21 THE COURT: Okay. Redirect.

22 REDIRECT EXAMINATION

23 BY MR. KELLEHER:

24 Q. Mr. Benczkowski, so the project number for this  
25 Vought project was 1588?



Benczkowski - redirect

1 A. Correct.

2 Q. Do you recognize that number?

3 A. Yes, I do.

4 Q. Have you ever seen the machine that this project  
5 refers to?

6 A. Yes, I have.

7 Q. Where?

8 A. At Vought. Dallas, Texas.

9 Q. Have you seen the cassettes used with that machine?

10 A. Yes, I saw the cassettes on the machine while I was  
11 working at Par.

12 Q. And approximately how much cassettes are there for  
13 that machine?

14 A. 48 that fit on one machine, and there is another  
15 machine right next to it that has another 16.

16 Q. Are there any labels or company logos on that  
17 cassettes?

18 A. The Broetje logo is on those cassettes.

19 Q. Is the F2C2 or AHG logo on any of them?

20 A. No.

21 Q. This is JTX-14 that was being looked at a moment ago.  
22 And, Mr. Benczkowski, I'm going to hold up -- this is JTX-3  
23 that we were looking at earlier.

24 Your Honor, can I approach the witness? I  
25 promise to be very careful when I walk up.

Benczkowski - redirect

1 THE COURT: I imagine.

2 BY MR. KELLEHER:

3 Q. Mr. Benczkowski, is this the same logo that is shown  
4 on the screen here?

5 A. Yes, it is, except in black and white.

6 Q. What is that third letter?

7 A. It's an O with an umma over it which we have  
8 transferred to the B-r-o-e-t-j-e, which is the English  
9 translation since there is not an umma on an American  
10 keyboard.

11 Q. When you said the 2012 logo was different, what do  
12 you mean?

13 A. The 2012 logo is different in that we have changed  
14 the name to B-r-o-e-t-j-e, and we have also eliminated or  
15 removed what I call, what I call a meatball at the end of  
16 the logo.

17 Q. And is that what is shown here on PTX-650?

18 A. That is our current logo.

19 MR. KELLEHER: Nothing further, Your Honor.

20 THE COURT: Okay. Thank you. Mr. Benczkowski,  
21 you may step down.

22 Defendants may call their next witness.

23 MR. KELLEHER: Your Honor, I would called to the  
24 stand Mr. Holger Maylander.

25 THE COURT: Okay. Is this an interpreter we

Maylander - direct

1 have with Mr. Maylander?

2 MR. KELLEHER: That's correct, Your Honor. He  
3 is going to attempt to do as much in English as possible,  
4 but she is there for his convenience and need.

5 THE COURT: All right. Let's swear in the  
6 interpreter first as we did previously.

7 (Interpreter Lilly Olm placed under oath.)

8 ... HOLGER MAYLANDER having been first duly  
9 sworn, was examined and testified as follows ...

10 THE COURT: Good morning, Mr. Maylander.  
11 Welcome.

12 THE WITNESS: Good morning.

13 MR. KELLEHER: May I approach?

14 THE COURT: You may approach, yes.

15 (Binders passed forward.)

16 DIRECT EXAMINATION

17 BY MR. KELLEHER:

18 Q. Mr. Maylander, could you please introduce yourself to  
19 the jury.

20 A. My name is Holger Maylander.

21 Q. Where do you work?

22 A. I work for Broetje Automation in Germany.

23 Q. Where do you live?

24 A. Also in Germany in the Northwest.

25 Q. How long have you worked at Broetje?

Maylander - direct

1 A. I work for Broetje since 1991.

2 Q. What is your current job title?

3 A. My current job title is an Executive Vice President  
4 for Sales and Marketing.

5 Q. Mr. Maylander, could you pull your microphone a  
6 little bit closer to yourself?

7 A. (Witness complies.)

8 THE COURT: Thank you.

9 BY MR. KELLEHER:

10 Q. What have been your job titles over the years at  
11 Broetje Automation?

12 A. I started as a Project Manager for Sales and  
13 Marketing -- for Sales. Sorry. Then I became Director of  
14 Sales and Marketing to finally Executive Vice President.

15 Q. Could you tell us about your education?

16 A. I graduated from a university in the military,  
17 University of Munich as an engineer for aerospace  
18 technology.

19 Q. So have you ever had occasion to work with AHG or  
20 F2C2?

21 A. Yes.

22 Q. When was the first time?

23 A. That was my very first project in 1991.

24 Q. And who was the customer?

25 A. The customer was British Aerospace and a company in

Maylander - direct

1 England.

2 Q. Are they sometimes called BAE?

3 A. Yes, that is the abbreviation.

4 Q. What was your role?

5 A. My role was project manager.

6 Q. Was AHG involved?

7 A. AHG was involved.

8 Q. What was their role?

9 A. Their role was to be a supplier to us.

10 Q. For what component?

11 A. For a single cassette.

12 Q. Could you repeat that? I'm sorry.

13 A. For a single cassette.

14 Q. Just one cassette?

15 A. Just, as far as I know, yes, it was just one  
16 cassette.

17 Q. Okay. Any racks or loading stations?

18 A. No. The single rack was in a kind of housing which  
19 took over more or less function of a rack.

20 Q. Do you remember what the cassette looked like?

21 A. No. It was directly shipped to England to the  
22 customer. It was a military project. It was very secret,  
23 so we just delivered it from AHG directly to England.

24 Q. When did you next work with AHG or F2C2?

25 A. It was in 1994.

Maylander - direct

1 Q. On what project was that?

2 A. That was a project here in the United States. It was  
3 Boeing in Wichita, Kansas.

4 Q. Do you remember the project number or numbers that  
5 were used for that?

6 A. Yes, it was 1501 and 1502.

7 Q. How did it come to happen that you were working again  
8 with AHG?

9 A. Our general manager at that time, Mr. Holtmeier, he  
10 asked me to try the product from AHG for this project, which  
11 were two big riveting machines.

12 Q. And what did you do then?

13 A. I personally contacted AHG and asked for a quotation.

14 Q. Could you turn to Page 116 -- Exhibit 116 in your  
15 binder.

16 A. Yes.

17 Q. That was the wrong one.

18 Could you turn to 119?

19 A. Yes.

20 Q. Could you tell us very briefly what is 119?

21 A. 119 is a fax where I ask for a quotation to AHG, to  
22 Mr. Bornes.

23 MR. KELLEHER: I believe this is already in  
24 evidence.

25 MR. LINDVALL: No objection if it is not.

Maylander - direct

1 THE COURT: It is admitted, or already admitted.

2 BY MR. KELLEHER:

3 Q. Paragraph 4 says Will your rack provide an electrical  
4 signal about the quantity of rivets available and/or left in  
5 one cassette? Do you see that?

6 A. Yes.

7 Q. What were you asking there?

8 A. This was a kind of light barrier we were asking for  
9 to make sure we had information in our system if a single  
10 rivet was selected and passed a certain position.

11 Q. What was AHG's response to that?

12 A. They integrated that in the system.

13 Q. Could you please turn to Exhibit PTX-188?

14 MR. KELLEHER: Your Honor, I believe this is  
15 also in evidence already.

16 THE COURT: Any objection to PTX-188?

17 MR. LINDVALL: Either way.

18 THE COURT: All right. It is admitted.

19 BY MR. KELLEHER:

20 Q. Could you look to the second page, Mr. Maylander. I  
21 know this is a difficult copy to read. This is the only one  
22 that the plaintiffs have been able to find. Could you look  
23 at Paragraph No. 6?

24 A. Yes.

25 Q. It says, "Is there any fix assignment of the

Maylander - direct

1 cassettes to the rack places or is it possible to code the  
2 cassettes so that the control of the system can identify  
3 which cassettes are placed at which position in the rack?"

4 Do you see that?

5 A. Yes.

6 Q. What is this talking about?

7 A. This is talking about the kind of coding system for  
8 each cassette, which allows our machine control system to  
9 know what is in this cassette, what kind of information  
10 about the fasteners, quantity of fasteners, type fasteners.

11 Q. What did AHG do in response to this?

12 A. They found a solution to integrate this code system  
13 into the cassette.

14 Q. What was that solution?

15 A. That was a design I think in the back side of the  
16 cassette to integrate the code right there.

17 Q. Do you know if AHG or F2C2 still uses that idea?

18 A. Yes.

19 Q. Were there any other ideas that Broetje had for this  
20 purchase in 1994?

21 A. Not specifically that I can remember.

22 Q. Could you please look at Exhibit 151.

23 THE COURT: PTX-151. Correct?

24 MR. KELLEHER: Correct, Your Honor.

25 BY MR. KELLEHER:



Maylander - direct

1 Q. Mr. Maylander, do you recognize this document?

2 A. Yes.

3 Q. Could you tell us what it is?

4 A. It is a kind of advertising page from the F2C2 system  
5 about our machine and a rack system from AHG.

6 MR. KELLEHER: Your Honor, I would move the  
7 admission into evidence of PTX-151.

8 MR. LINDVALL: No objection.

9 THE COURT: It is admitted.

10 (Exhibit PTX-151 received in evidence.)

11 BY MR. KELLEHER:

12 Q. What is that large contraption there in the middle,  
13 Mr. Maylander?

14 A. That is the frame on our machine, carrying a fuselage  
15 panel of an aircraft.

16 Q. And the lower portion, there is another photograph.  
17 Do you see that?

18 A. Yes.

19 Q. What is that?

20 A. That is the rack system from AHG, including  
21 cassettes, and two columns of racks.

22 Q. Do you know for which project this particular rack  
23 is?

24 A. I don't know for which particular project it is. It  
25 is definitely not for the machine shown in the background.

Maylander - direct

1 Q. Why do you say that?

2 A. Because it has three columns instead of two.

3 Q. The cassettes that AHG delivered for the Boeing  
4 Wichita project, what material were they made out of?

5 A. They were basically made on the sides of plastic.

6 Q. And are those the ones that were ultimately delivered  
7 to Wichita?

8 A. Yes.

9 Q. Were there any problems with this particular project?

10 A. Yes. We had several, numerous issues with the  
11 system, which had to be straightened out.

12 Q. Could you tell us what those were?

13 A. This was, the first one, inside the cassettes, there  
14 is a separator, where we had the problems that the single  
15 fastener which had separated has been stuck in the  
16 separator, as well as the part which comes afterwards inside  
17 the rack, which was at that time a rotator block.

18 Q. Could you explain what the rotator is?

19 A. A rotator is a kind of mechanical device, with a  
20 channel in between. This channel is in the direction of the  
21 output of the cassette, which we call separator, so when a  
22 rivet is selected, it is pushed by pressurized air into this  
23 rotator block, so out of the cassette into this rotator  
24 block. Then the rotator block turns 90 degrees, and lets  
25 the fastener fall down to the bottom of the rack.

Maylander - direct

1           And behind each of the cassettes, there is this  
2     rotator device. So when we have a rack of 12 cassettes, you  
3     have behind each cassette in the rack a rotator. And if  
4     you, for example, have a cassette selected for a fastener in  
5     the upper portion, you can imagine when all 12 rotators have  
6     to be aligned that the fastener can fall down to the bottom.  
7     From there, there is pressurized air to be shot into the  
8     riveter machine head. This alignment is extremely important  
9     and we had tremendous problems to get this alignment solved.

10    Q.       I am going ask you to look at JTX-27.

11           Do you know what this document is?

12    A.       Yes. This is a document from AHG about a former  
13     cassette feeder system.

14           MR. KELLEHER: Your Honor, I would offer into  
15     evidence JTX-27.

16           MR. LINDVALL: No objection.

17           THE COURT: It's admitted.

18           (JTX-27 received in evidence.)

19    BY MR. KELLEHER:

20    Q.       Is there a photograph here of the AHG system on the  
21     front page?

22    A.       Yes.

23    Q.       That is circled?

24    A.       That is circled. It is the former version, yes.

25    Q.       Why don't we turn to the third page of this. Does

Maylander - direct

1 this have anything to do with the rotator system you were  
2 talking about a moment ago?

3 A. Yes.

4 Q. Could you explain how?

5 A. Yes. This is a kind of step-by-step description how  
6 it operates. On the left upper figure, the Step 0, just  
7 called the waiting point, the upper portion is the rotator  
8 and separator picture of a cassette. From the right-hand  
9 side you see the tube with the fasteners in a row, and the  
10 little black bars vertically orientated are showing the  
11 microactuator phase, and the last one is holding the last  
12 fastener on its head.

13 Q. What happens after this?

14 A. It happens after this Step 1 that the spindle  
15 fastener gets into the regulator.

16 Q. Is that shown in Step 2?

17 A. Step 1. The next step the regulator rotates by 90  
18 degrees.

19 So you can see, the fastener can go into the  
20 rotator. And the next step is then, this is to the left,  
21 the fastener is now in. Now the regulator can rotate so  
22 that the channel is closed. So it can fall down to the  
23 bottom, as shown here.

24 Q. Were there difficulties with this system?

25 A. Yes. Because these are 12 systems on top of each

Maylander - direct

1 other, they had to be straightly aligned, so that the very  
2 sharp edges of the fastener head are not sticking there on  
3 the edges of these rotators. So there were a lot of  
4 problems with the alignment.

5 Q. How well did these rotators work at Wichita?

6 A. I can't say how much, but we had almost every week an  
7 issue with it is. There was a special, let me say,  
8 mechanical maintenance person assigned just to fix the  
9 problem with the rotators, and he got a nickname. They  
10 called him "The Rotator Man."

11 Q. Was there any solution for this problem?

12 A. By the time, being as it was more or less no longer  
13 acceptable, we proposed to use another mechanical situation.

14 Q. What was that?

15 A. That was a sled system.

16 Q. Would you tell us what a sled means?

17 A. A sled is, let me say, comparable to an elevator. In  
18 our alternative system to the cassette system, we call it a  
19 hopper system, we had this kind of sled. So that there is a  
20 device moving to the single position of the cassette in the  
21 rack, and accepting the fastener which has been requested.  
22 Then it is moving very fast in the background of the rack.

23 Q. Do you know whether AHG adopted this idea of a sled?

24 A. Yes, they did.

25 Q. Do you know if they still use it today?

Maylander - direct

1 A. I think so, yes.

2 Q. After this Wichita project, did Broetje continue  
3 working with AHG?

4 A. Yes.

5 Q. Did there come a time when Broetje began working with  
6 F2C2?

7 A. Can you ask that again?

8 Q. Yes. Did there come a time when Broetje began to  
9 hear the name F2C2?

10 A. F2C2, yes, sorry. About the beginning of 2000, 2001.

11 Q. Can you explain the change?

12 A. Mr. Bornes informed me that they had set up a known  
13 company as a daughter company to AHG just to do the business  
14 we were in, cassettes, racks, and load installations.

15 Q. During the early 2000s, did Broetje work with F2C2 as  
16 a supplier for these machines?

17 A. Yes.

18 Q. Were there any difficulties during that period?

19 A. Yes. We had constantly these technical problems to  
20 fix.

21 Q. What kind of technical problems?

22 A. This was, for example, the, let me say, the  
23 workmanship was always requesting us to make fixes. And  
24 most of the time we asked AHG or F2C2, in particular, Mr.  
25 Bornes, to come and do the fixes either in our house before

Maylander - direct

1 we delivered this to our customer or sometimes also at the  
2 customer site.

3 Q. Were they able to respond satisfactorily?

4 A. Yes, they always did that.

5 Q. Did there come a time when their responses were no  
6 longer acceptable?

7 A. Yes. There were certain times, depending on the  
8 amount of work to be done -- because, in our kind of  
9 business, we very often have waves of business coming, very  
10 high. And sometimes low. In these periods where we had  
11 very high business situations, the small group of people had  
12 tremendous problems to deliver in time and also to solve the  
13 technical problems on top of them.

14 Q. Was there any way that these technical problems were  
15 communicated to F2C2?

16 A. Yes.

17 Q. How?

18 A. We have assigned a special person in our house, Mr.  
19 Lutz Neugebauer, to communicate and be the interface to AHG  
20 and F2C2. And he wrote always a kind of followup report.

21 Q. Do you know if Mr. Neugebauer is here in Wilmington,  
22 Delaware here today?

23 A. Yes, he is.

24 MR. KELLEHER: We will be hearing from him next,  
25 Your Honor.

Maylander - direct

1 BY MR. KELLEHER:

2 Q. You mentioned timing of delivery problems. How was  
3 Broetje's reaction to that communicated to F2C2?

4 A. Of course, we were always in very close communication  
5 with F2C2 at that time, and asked them to respond to us or  
6 to come to face-to-face meetings.

7 Q. Could you please look in your exhibit book to  
8 DTX-1460?

9 A. (Witness complies.)

10 Q. What is this?

11 A. This is a letter from me writing to Mr. Bornes that  
12 we --

13 Q. One second. This is an e-mail from you to  
14 Mr. Bornes. Do you know the date?

15 A. The date was November the 7th of 2002.

16 MR. KELLEHER: Your Honor, I would offer into  
17 evidence DTX-1460, if it is not already in.

18 MR. LINDVALL: No objection.

19 THE COURT: It's admitted or readmitted.

20 (DTX-1460 is admitted into evidence.)

21 BY MR. KELLEHER:

22 Q. So, Mr. Maylander, what are you saying here?

23 A. So I'm actually explaining my concern about the  
24 upcoming deliveries. These are numerous rack, cassettes,  
25 and loading stations. And we learn from our customer the



Maylander - direct

1 word "bottleneck." Boeing in Wichita, Kansas. They used  
2 this also to remind us that we are having tremendous amount  
3 of machines coming inline and they want to make sure that  
4 everything is on time.

5 Q. And do you request a meeting here?

6 A. Yes.

7 Q. Did that meeting ever occur?

8 A. Yes.

9 Q. Did the problems resolve?

10 A. We found a solution, but it was always, let me say,  
11 delay in the deliveries at that time. And we had to  
12 combinate it with our work.

13 Q. What did you mean by that?

14 A. That means we had to rearrange schedules and explain  
15 and ship the equipment afterwards.

16 Q. Did there come a time when Broetje learned they were  
17 not F2C2's only customer?

18 A. Yes.

19 Q. Could you please explain?

20 A. I got information from Mr. Bornes, that he formed me  
21 that they are also going to work together with our  
22 competitor, Gemcor.

23 Q. When was that?

24 A. I think that was in 2002.

25 Q. And how did you react?

Maylander - direct

1 A. Our reaction was extremely disappointing.

2 Q. Mr. Maylander, you said disappointing? Is that what  
3 you intended to say?

4 A. Sorry. Probably my English. It was an emotional  
5 situation. You worked for so long time, and we also helped  
6 AHG to make a very professional system out of their cassette  
7 system. We spent a lot of money and time on that, and you  
8 hear that they are also using this system at our most  
9 important competitor, and this was like feeling divorced  
10 from the partner.

11 Q. Why did F2C2 say they were doing this?

12 A. Of course, I asked the question, and the answer was  
13 that they said that in certain areas of time, it is not  
14 enough business for them to do with Broetje.

15 Q. Could you look at JTX-66?

16 MR. KELLEHER: I believe this is already in  
17 evidence.

18 THE COURT: No objection?

19 MR. LINDVALL: No objection.

20 THE COURT: Okay.

21 (JTX-66 is admitted into evidence.)

22 BY MR. KELLEHER:

23 Q. Mr. Maylander, what is this?

24 A. Yes. This is my e-mail from 18th of June, 2002 where  
25 I gave the feedback that I talked to our general manager

Maylander - direct

1 Mr. Holtmeier and expressed our situation that we were very  
2 disappointed and unhappy about that behavior.

3 Q. And it says, because our both companies have  
4 developed an ARS with a lot of cost on both sides.

5 Do you see that?

6 A. Yes.

7 Q. What do you mean that?

8 A. The ARS system is the name for the automated riveting  
9 system. We gave them different names, but in principle,  
10 that is the rack system, cassette system.

11 Q. And when you say both companies have developed an ARS  
12 with a lot of cost on both side, what did you mean by that  
13 part?

14 A. So we helped AHG over the time to make a professional  
15 system out of it. When you have a machine like our  
16 machines, our customers expecting from us a very high  
17 availability of the system. If not, they ask for penalties.  
18 So we have spent a lot of money and time to support AHG to  
19 bring it to a certain level.

20 Q. And then it goes on in the next sentence to say: Now  
21 you are deal with our main competitor Gemcor and with this  
22 deal Gemcor gets all the experience we have paid for.

23 What do you mean by that?

24 A. That means that we have spent the money to help AHG  
25 developing this, status of this level of system, ARS system.

Maylander - direct

1 And all this as a result will be given to Gemcor.

2 Q. So then you have another sentence here: You may  
3 think about the additional cost for Gemcor to split with us  
4 in order to compensate also our part of development.

5 Do you see that?

6 A. Yes.

7 Q. What did you mean by that?

8 A. That was a discussion I had with Mr. Bornes, and he  
9 offered the compensation as a possibility to us in the form  
10 of giving Gemcor a higher price and sharing some money with  
11 us.

12 Q. Did that ever happen?

13 A. No.

14 Q. Did you ever have any face-to-face discussions with  
15 Mr. Bornes about this?

16 A. Yeah, there were several discussions, and the final  
17 face-to-face meeting we had in 2004 at SAE conference  
18 in St. Louis. St. Louie.

19 Q. Was there any discussion during that big meeting in  
20 2004 about compensation?

21 A. We only had one phone conference call there.

22 Q. When was the decision made to stop using F2C2 as a  
23 supplier of the rivet feed system?

24 A. I think it was some time in 2003.

25 Q. So who made that decision?

Maylander - direct

1 A. Our general manager at the time, Mr. Holtmeier.

2 Q. Why was that decision made?

3 A. The decision was made basically on two reasons. One  
4 reason is that we have been under such a pressure from our  
5 customer, especially Boeing in Wichita, Kansas that they  
6 expected from us to deliver a system which is professionally  
7 robust and solid for the process. They expect it from us.

8 The second is, of course, that we felt so  
9 disappointed by the decision of AHG to go to our competitor,  
10 Gemcor.

11 Q. So when the decision was made to build a Broetje  
12 system, how similar did Broetje want the cassette to be  
13 F2C2's cassette?

14 A. Similar is very much depending on the functionality  
15 from my point of view. So one request from our customers  
16 was that they said we expect from you a system which is  
17 still interchangeable with the old existing racks.

18 Q. Were there any changes to be made?

19 A. Of course, there were several changes. One of the  
20 changes were that we made the sides basically out of metal,  
21 to make them more robust for the process. Another one was,  
22 we put our label on, clearly saying Broetje Automation.

23 Q. During the phase of when the Broetje product was  
24 being developed, was any thinking given to the issue of  
25 patents that might be out there?

Maylander - direct

1 A. Yes, of course. Because we were aware that patents  
2 were existing from AHG. So we involved at that time the  
3 patent lawyer from our owner.

4 Q. And when you say "owner," who is that?

5 A. That is the CLAAS company at that time.

6 Q. I'm sorry. Who was the person that got involved?

7 A. The person was Dr. Steffen Budach.

8 Q. And I'll ask you were you personally involved after  
9 that with Dr. Budach?

10 A. No.

11 MR. KELLEHER: Your Honor, I have no further  
12 questions at this time.

13 THE COURT: Thank you. I assume cross will be  
14 more than five minutes; is that correct?

15 MR. LINDVALL: Yes, Your Honor.

16 THE COURT: Then we'll let the jurors have their  
17 lawn. No talking about the case during the break, and we'll  
18 get you back during this afternoon.

19 (Jury left courtroom.)

20 THE COURT: All right. We will be in recess.

21 (Brief recess taken.)

22 \* \* \*

23 Afternoon session - 12:45 p.m.

24 THE COURT: Bring the jury in.

25 At the next break I will give you a chance to

Maylander - cross

1 make your argument on the motion.

2 (Jury returned.)

3 THE COURT: Welcome back. Your lunch smelled  
4 very good. I hope it tasted as good as it smelled.

5 We are ready to proceed. Mr. Lindvall.

6 MR. LINDVALL: Thank you, Your Honor.

7 CROSS-EXAMINATION

8 BY MR. LINDVALL:

9 Q. Good afternoon, Mr. Maylander.

10 A. Good afternoon.

11 Q. The way I understand your testimony is that you have  
12 had a relationship or been dealing with AHG or F2C2 from  
13 approximately 1991 to 2005. Does that sound about right?

14 A. Yes.

15 Q. Approximately 14 years. Correct?

16 A. Correct.

17 Q. Now, during this 14-year period, you had been dealing  
18 with AHG and F2C2 relating to their cassette-based rivet  
19 feeding system. Correct?

20 A. We had been dealing with that system, yes.

21 Q. Now, you testified earlier that Mr. Bornes told you  
22 that AHG was going to start doing business with Gemcor.  
23 Correct?

24 A. I can't remember exactly his wording. He informed me  
25 about that they are dealing or already in contact about

Maylander - cross

1 that.

2 Q. Okay. Let's look at JTX-66, please.

3 This is the e-mail you were shown during your  
4 direct examination. Correct?

5 A. That's correct.

6 Q. And in this e-mail, you state that -- you mention in  
7 here or indicate that Mr. Bornes had told you that AHG is  
8 going to start doing business with Gemcor. Correct?

9 A. I have made reference that I informed him about  
10 activities with Gemcor.

11 Q. And you agree that means that you knew from Mr.  
12 Bornes that AHG was going to start selling to Gemcor.  
13 Correct?

14 A. No, not selling. I can't say that. I just got the  
15 information about activities. That could mean selling or  
16 dealing or exchanging quotations.

17 Q. What about right here? It says, "You may think about  
18 the additional cost for Gemcor to split with us in order to  
19 compensate also part of our development."

20 Is that talking about selling to Gemcor?

21 A. That's not talking about selling to Gemcor. It is  
22 just if they do that, to compensate.

23 Q. It is your testimony that Mr. Bornes here just said,  
24 oh, I am just talking to Gemcor, I don't have any plans to  
25 sell to Gemcor? Is that correct? Is that what your



Maylander - cross

1 testimony is?

2 A. I can't say that he sold it. His wording was, as far  
3 as I remember, that they had activities to exchange and that  
4 he informed me about that they are going also to Gemcor. My  
5 interpretation is that they are selling their equipment.

6 Q. Okay. So you interpreted Mr. Bornes' conversation  
7 with you that they were going -- that AHG was going to sell  
8 to Gemcor. Correct?

9 A. Which has been proven later on that they did, yes.

10 Q. That wasn't my question. Please listen to my  
11 question. Your counsel here can ask you questions in  
12 followup later on.

13 My question is, you understood Mr. Bornes'  
14 conversation with you that Mr. Bornes said that AHG was  
15 going to start doing or start selling or some type of  
16 business activity with Gemcor. Correct?

17 A. Correct.

18 Q. And as a result of that conversation in which Mr.  
19 Bornes actually told you that, Mr. Holtmeier was extremely  
20 disappointed and unhappy. Correct?

21 A. Mr. Holtmeier was extremely unhappy, yes.

22 Q. And Mr. Holtmeier was the general manager of Broetje.  
23 Correct?

24 A. Mr. Holtmeier was at that time the general manager.

25 Q. For the jury's edification, general manager means he

Maylander - cross

1 was at the top, he was at the top of Broetje. Correct?

2 A. He was responsible for the business of the company.

3 Q. He is like the CEO in the United States. Correct?

4 A. We don't use that in Germany.

5 Q. I understand. But there was no one above Mr.

6 Holtmeier at this particular time. Correct?

7 A. No.

8 Q. Mr. Bornes here, he didn't have any obligation to

9 tell you he was going to start having activities with

10 Gemcor. Correct?

11 I will rephrase the question.

12 Mr. Bornes did not have an obligation to tell

13 you, We are going to start selling our cassette-based

14 systems to Gemcor. Correct?

15 A. From a point of view of the -- of a very good

16 partnership we told at that time or before that time, I

17 would call it a certain obligation.

18 Q. Yes. So Mr. Bornes recognized that partnership and

19 that good faith that should enter into that kind of

20 situation. Correct?

21 A. He took that information as a kind of obligation,

22 from what I understand, yes.

23 Q. Okay. I believe you testified that -- well, you

24 understand that AHG didn't find out about the Broetje

25 cassette-based system that they had developed on their own

Maylander - cross

1 until it was discovered by them in Germany in 2005.

2 Correct?

3 A. I was not part of that.

4 Q. But you never told Mr. Bornes that we are going to  
5 develop our own cassette and we are not going to use you  
6 anymore. Correct?

7 A. I was not involved with him anymore at that time.

8 Q. All I am trying to say, Mr. Bornes, he understood the  
9 good-faith partnership you had, Broetje, though, never  
10 indicated to AHG back and said, you know what, we have had  
11 all these problems, you are dealing with Gemcor, we are not  
12 going to deal you anymore, good luck you guys, we are going  
13 to develop our own cassette? They went behind the back and  
14 went and developed their own cassette without telling AHG.  
15 AHG had to discover that on their own. Correct?

16 A. I can't agree on that. I personally did not. But I  
17 can't speak for the company.

18 Q. I understand. You speak for yourself.

19 Let's turn to PTX-358T, please. If we could  
20 turn to Page 10 of 358T.

21 You were involved with AHG in 1994. Correct?

22 A. I was involved, yes.

23 Q. You know that AHG and Broetje entered into an  
24 agreement in approximately 1994. Correct?

25 A. No. I was not involved in that agreement.

Maylander - cross

1 Q. So you never knew that there was a contract between  
2 AHG and Broetje?

3 A. I was involved that Mr. Holtmeier informed me that I  
4 should be in contact with AHG to try their system for our  
5 project. But not on the contract.

6 Q. So there is 14 years of you dealing with AHG, you  
7 never knew there was a contract between AHG --

8 A. There was no contract is what I am referring to.

9 Q. Let's look at this document. That is Mr. Holtmeier's  
10 signature?

11 A. Yes.

12 Q. He is the one who heads up Broetje at this time.  
13 Correct?

14 A. Yes.

15 Q. And he says, "With signing the contract, please let  
16 us have more detailed technical information as well as a  
17 reference visit to Dassault."

18 Do you see that?

19 A. Yes.

20 Q. Let's turn to the next page.

21 Do you recognize Mr. Holtmeier's signature on  
22 the contract here?

23 A. Yes, that is his signature.

24 Q. Contract as fax'd. Do you see that? "Accepted"?

25 Do you see the word accepted?

Maylander - cross

1 A. I see that, yes.

2 Q. Let's turn to Page 13, please. You understand that  
3 AHG was perfectly within their bounds in your partnership,  
4 as you have described it, to sell to anyone else anywhere in  
5 the world except for in Germany. Correct? You understood  
6 that?

7 A. I understand that.

8 Q. So AHG was perfectly within their bounds to sell to  
9 Gemcor, who was located in the United States. Correct?

10 A. That's what I understand, yes.

11 Q. Now, if we turn to Page 13, please.

12 If we look at the bottom part here. You see  
13 here that Broetje, it says, This is an agreement that Mr.  
14 Holtmeier has made with AHG. Broetje agrees to promote the  
15 sales of AHG feed systems in the most loyal, serious and  
16 efficient way possible."

17 Do you see that language?

18 A. Yes.

19 Q. Kind of like the loyalty Mr. Bornes felt when he told  
20 you that we are going to start looking at Gemcor now. He  
21 felt obligated because that was part of the good-faith  
22 partnership. Correct?

23 A. I don't understand the question.

24 Q. We will move on. We will talk about it a little bit  
25 more.

Maylander - cross

1           If we go to Page 14, please, in Article 4, the  
2       first paragraph. This is another obligation that Broetje  
3       agreed to in this contract between AHG, it says, "The dealer  
4       Broetje agrees not to sell, directly or indirectly, feed  
5       systems with identical or similar tubes to those under this  
6       contract and likely to compete with them, i.e., using the  
7       tube and box principle."

8           We have testimony earlier indicating a box is a  
9       cassette.

10           Did you see this?

11       A.       Yes.

12       Q.       Were you aware of this provision between the  
13       companies?

14       A.       I wasn't aware on the details here.

15       Q.       Let's turn to Page 16, please. After 11, let's look  
16       at the first paragraph. It says, "The dealer," who is  
17       Broetje, "agrees not to disclose to third parties the  
18       confidential documents and information provided to it by AHG  
19       in connection with this contract. This secrecy clause shall  
20       survive the expiration of this contract."

21           Let's turn to the next portion of this section.

22           It says, "In addition the dealer," who is  
23       Broetje, "agrees not to use, directly or indirectly, such  
24       documents and information after the expiration of this  
25       contract."

Maylander - cross

1 Do you see that?

2 A. Yes.

3 Q. And you understand that Broetje had made that  
4 obligation to AHG. Correct?

5 A. When their contract was active, yes.

6 Q. Now, let's go back to JTX-66, please. This is the  
7 e-mail we were looking at a couple of minutes ago. Looking  
8 at the e-mail, do you see the word faults in that e-mail?

9 A. I can't see that faults.

10 Q. Exactly. The word is not in there. Is it?

11 A. Okay.

12 Q. So you are not -- you didn't mention in this e-mail  
13 anything about any faults with the system. Correct?

14 A. I can't see the word fault in that e-mail.

15 Q. Just to answer my general question. There is no  
16 discussion about faults with AHG's system in this e-mail.  
17 Correct?

18 A. That's correct.

19 Q. Now, let's turn to JTX-14, please. Have you seen  
20 this document before, Mr. Maylander?

21 Why don't we turn to Page 2 of this. Do you  
22 recognize this document, Mr. Maylander?

23 A. I was not involved. What I read, it is a paper from  
24 us or a presentation from us about development.

25 Q. It's about development?

Maylander - cross

1 A. Development.

2 Q. Now, for us, like myself, who can't read German, can  
3 you read that in English for me, please?

4 A. Development of innovative rivet feeding technique.

5 Q. So this is not a training document for Broetje.  
6 Correct?

7 A. It's development.

8 Q. It's not what Mr. Benczkowski referred to as a  
9 training document, it is a development document. Correct?

10 A. That's what the title is saying, yes.

11 Q. If we could look at Page 13 of this. In this with  
12 development document for Broetje's cassette-based rivet  
13 system? We have some photographs in it, don't we?

14 A. Yes.

15 Q. And the photographs you see, are those AHG's system?

16 A. These pictures are AHG.

17 Q. Let's look at Page 15, please. I don't know if you  
18 know this or not. But you understand, these are pictures of  
19 AHG's system?

20 A. I don't know. There are so many details, I can't say  
21 that.

22 Q. This is too detailed a photograph for you to tell?

23 A. It is a photograph showing something, with tubing,  
24 yes.

25 Q. It's showing some details of AHG's system?



Maylander - cross

1 A. No, because it's not AHG.

2 Q. So if Dr. Peters said this was AHG, would you believe  
3 it then?

4 A. If Dr. Peters was saying that?

5 Q. Yes.

6 A. I believe him.

7 Q. Let's look on Page 17, please. Do you recognize that  
8 rack? Is that an AHG rack or a Broetje rack?

9 A. That is just a storage.

10 Q. Do you know who makes that storage?

11 A. I don't know.

12 Q. What if Dr. Peters said that was an AHG rack, would  
13 you believe him?

14 A. We use the rack here not for storage. This is  
15 different.

16 Q. I understand. If Dr. Peters described this here in  
17 his testimony that that was an AHG rack, would you believe  
18 him?

19 A. Yes, same way.

20 Q. Let's look at Page 18, do you recognize this?

21 A. Yes.

22 Q. And that's a cassette made by AHG/F2C2 Systems?

23 A. Yes.

24 Q. And you see inside there it has the AHG/F2C2 Systems?

25 A. Yes, I see the logo on there. Yes.

Maylander - cross

1 Q. And this is in the development document to develop  
2 Broetje's cassette; correct? This picture.

3 A. It belongs to Broetje.

4 Q. Let's go to the next page, please.

5 Whose cassette is that? Is that Broetje's or  
6 AHG's?

7 A. It doesn't say that, but it looks like an AHG  
8 cassette.

9 Q. Let's go to the next one.

10 Whose is that? Is that AHG's or is that  
11 Broetje's?

12 A. That's the back side of a rivet cassette. It doesn't  
13 say anything, who it is.

14 Q. Okay. We're not sure who it is. Let's go to the  
15 next slide.

16 Whose cassette is that? Can you tell?

17 A. That's a separator.

18 Q. Do you know if that is Broetje or AHG?

19 A. I can't say that.

20 Q. You can't say. Okay. Now, just bear with me for one  
21 second.

22 So approximately a little less than a year after  
23 your e-mail where you informed Mr. Holtmeier that Mr. Bornes  
24 said you were going to do work with Gemcor, you understand  
25 that Broetje then decided to go ahead and develop their own

Maylander - cross

1 cassette; correct?

2 A. There a decision in our company.

3 Q. Yes. And that was an internal decision in the  
4 company; correct?

5 A. I was not part of that.

6 Q. Okay. And that was Mr. Holtmeier was part of it,  
7 though? The one who signed the contract?

8 A. Mr. Holtmeier was part of the development team.

9 MR. LINDVALL: Okay. Thank you very much.

10 THE COURT: Thank you. Redirect.

11 MR. KELLEHER: Nothing further, Your Honor.

12 THE COURT: Okay. You may step down. Thank you  
13 very much.

14 You may call your next witness.

15 MR. KELLEHER: Thank you. Your Honor, we call  
16 to the stand Mr. Lutz Neugebauer.

17 THE COURT: Okay.

18 ... LUTZ NEUGEBAUER, having been first duly  
19 sworn, was examined and testified as follows ...

20 THE COURT: Good afternoon to you,  
21 Mr. Neugebauer. Welcome.

22 You may proceed, Mr. Kelleher.

23 MR. KELLEHER: May I approach?

24 THE COURT: You may.

25 (Binders passed forward.)

Neugebauer - direct

1 DIRECT EXAMINATION

2 BY MR. KELLEHER:

3 Q. Mr. Neugebauer, could you please introduce yourself  
4 to the jury?

5 A. So my name is Lutz Neugebauer.

6 Q. Where do you live?

7 A. I live in Farber in Northern Germany.

8 Q. For who do you work?

9 A. I work for Broetje Automation Germany, which is a  
10 subdivision of Broetje Automation.

11 Q. And for how long have you worked for Broetje  
12 Automation?

13 A. I started to work for Broetje Automation in 1991.

14 Q. And what is your current job title?

15 A. I'm a general manager of the company, Broetje  
16 Automation Germany.

17 Q. When -- I'm sorry. What was your job title in the  
18 early 2000s?

19 A. I have worked as a project manager for Broetje  
20 Automation.

21 Q. What were your job responsibilities in that role?

22 A. I worked for -- as a project manager for riveting  
23 machine for these big fastening machines we have installed.  
24 And I have also managed the F2C2 or AHG company.

25 Q. Mr. Neugebauer, could you move the microphone a tiny

Neugebauer - direct

1 bit closer to yourself? I'm not sure everyone can hear.

2 A. (Witness complies.)

3 Q. When did you first begin working for AHG or F2C2?

4 A. Actually, 1994-1995. Around these years, I started  
5 to work with them.

6 Q. Do you remember the project?

7 A. Ya. It was the project for Boeing Wichita. It was  
8 the Em Juliet machine for the fuselage assembly.

9 Q. Do you remember the project numbers?

10 A. 1501.

11 Q. What do you remember about that project?

12 A. Actually, we received in March, April, something like  
13 that, 1995, the first AHG fastening system that was in the  
14 rack. And we unbox the rack and have our first look into  
15 the rack with our electricians and our mechanics and myself,  
16 and we opened the electrical cabinet which was located on  
17 top of the rack, and our electrician stands next to me  
18 and looked into it, and he said directly: What the hell is  
19 that? He said that because the wiring was not wiring  
20 against the standard, industrial standard, it was racetrack  
21 wiring. A racetrack, the racetrack like you have for little  
22 kids.

23 Q. What did you do in response?

24 A. So the first thing, what we did, before we start the  
25 machine, we have to completely rewire the machine. We put

Neugebauer - direct

1 out all the wires and put in real industrial standard wires.

2 And we produced, because we haven't had any  
3 electrical circuit diagrams, also a circuit diagram. The  
4 documentation we got from AHG at that time was more or less  
5 a Word documentation and not a CID documentation.

6 Q. What did you do with the circuit diagram?

7 A. Actually, later on, we provided it also to AHG, that  
8 they can wire according to this circuit diagram for their  
9 system.

10 Q. Do you know whether AHG continued to use that circuit  
11 diagram?

12 A. Ya. They used it a long time, for a very long time.

13 Q. What was the reason that you would open up the rack  
14 when it arrived?

15 A. Because we have to -- we have to -- of course, we  
16 have to connect our cables that you can start with the  
17 startup of the machine. It was original reason why we have  
18 to do that.

19 Q. Other than the wiring, were there any other changes  
20 that were suggested for AHG's system at that time?

21 A. Ya. We started very early then to introduce  
22 additional sensors to figure out where the rivets are in the  
23 system. So when we started to feed the system, the machine,  
24 we need to know where the rivet is, of course. So there  
25 were sensors not installed or missing also at the beginning.

Neugebauer - direct

1 Q. That would be sensors, s-e-n-s-o-r-s?

2 A. Yes, right. Sensors. Ring sensors.

3 Q. Any other changes?

4 A. Ya. Later on, we introduce proposition all to  
5 control the airflow in the cassettes we introduce a  
6 separator. We introduced several stuff. So additional  
7 equipment that we can make sure that the rivet is feed  
8 constantly right.

9 Q. Could you turn to exhibit -- I'll skip this exhibit.

10 Could you describe how well that system for  
11 Wichita worked?

12 A. It was at very beginning, it worked definitely total  
13 not so. We have had constantly problems with the system  
14 over the years. We were constantly working on the system to  
15 improve the performance, but we have had a lot of problems  
16 with it.

17 Q. Did Boeing Wichita ultimately accept the machine?

18 A. Not really. So one of the reason why we have, for  
19 example, to rewire the system, because Boeing would never  
20 accept these kind of machines into their facility. Never.

21 Q. But eventually it was installed?

22 A. It was installed, yes.

23 Q. So were the problems solved?

24 A. It took, it took really awhile that it can solve all  
25 the problems. But at the end, we haven't really solved all

Neugebauer - direct

1 the problems but we get the system to work so we can work  
2 with the machine.

3 Q. Now, Broetje continued to work with AHG after this  
4 project, yes?

5 A. Yes.

6 Q. And did there come a time when, instead of AHG, you  
7 started working with a company F2C2?

8 A. Yes.

9 Q. Do you remember when that was?

10 A. Around 2000-2009 -- 2001. Sorry for that. 2001,  
11 they started to get another name to F2C2, but it was still  
12 the same company.

13 Q. When you say it was the same company, do you mean  
14 they're the same corporations or the same people?

15 A. Ya. They just change the name, obviously for us.

16 Q. Overall, how would you describe the quality of F2C2's  
17 products and services?

18 A. The quality of the product and services was really  
19 over the nine years was not really sufficient. So we have  
20 constant problem. We have had constant problems to get the  
21 system to work. The cassettes, we have to rework the  
22 cassettes. We have to rework the system. We have to  
23 rebuild the system. So there a constant fight to get the  
24 system in a mode that we can feed the fasteners.

25 Q. What did you do to inform F2C2 about these problems?



Neugebauer - direct

1 A. Actually, we have sent a lot of e-mails and faxes.

2 At some point in time when I was a project manager, I start  
3 to develop this fault reports, we have sent fault parts to  
4 Phillippe Bornes to have a more formal way that we can put  
5 all the faults we have into the fault reports.

6 Q. When you say Phillippe, you mean Mr. Bornes?

7 A. Excuse me?

8 Q. When you say Philippe, do you mean Mr. Bornes?

9 A. Yes. Sorry.

10 Q. Can you turn to exhibit DTX-1077 in your book?

11 A. (Witness complies.)

12 Q. Can you tell us very briefly what this is?

13 A. Ya. In principle, we have the fault reports for the  
14 customer Domier here and we complained that we have --

15 Q. Mr. Neugebauer, let me ask a question. Who is the  
16 author of this document?

17 A. I'm the author of this document.

18 Q. And when was it created?

19 A. It was created in -- let me just see. The 14th of  
20 November, 2000.

21 Q. When you created this document, did you have personal  
22 knowledge of what is reported in it?

23 A. Yes, of course. I wrote it.

24 Q. And was this document created in the ordinary course  
25 of business?

Neugebauer - direct

1 A. Ya.

2 Q. And was it kept in the ordinary course of business?

3 A. Yes, of course.

4 MR. KELLEHER: Your Honor, I would move the  
5 admission of exhibit DTX-1007.

6 MR. LINDVALL: No admission.

7 THE COURT: It's admitted.

8 (DTX-1007 is admitted into evidence.)

9 BY MR. KELLEHER:

10 Q. We have this now on the screen, Mr. Neugebauer. Can  
11 you tell the jury, please, what this document shows?

12 A. So the document shows the customer, so also my name  
13 as the responsible, as the responsible, and it shows also a  
14 rivet cassettes, and the rack. Ya, it's a rack separator.  
15 The unit is a rack separator, and we have problems with the  
16 rivet, with the codes LN and DUN that they do not go through  
17 the separator. So there was obviously a design problem, the  
18 distance between the two sticks in the separator. So the  
19 rivet drops down without the function of the separator.

20 Q. Could you explain for the jury what the separator is?

21 A. In fact, that is a little device at the end, where  
22 the rivet comes out the fastener feed system, where the  
23 rivet stops on two barrels, and then if we have the right  
24 orientation, then we remove it and the rivet drops into  
25 the tube, and we feed the air through the tube and then the

Neugebauer - direct

1 rivet.

2 Q. Is this, what I'm pointing to now where it comes out,  
3 where the rivet comes out on the rack?

4 A. Yes. This is not separator, this is a microactuator,  
5 and the separator is at the end of the fastener feed system  
6 of the rack, not of the cassette.

7 Q. So in the rack?

8 A. Ya, somewhere in the rack.

9 Q. Could you turn to Exhibit 1078, DTX-1078?

10 A. Ya.

11 Q. Is this a fax from you?

12 A. Ya.

13 Q. When was it sent?

14 A. I'm not sure where the date is.

15 It was sent at the beginning of 2001, in  
16 February 2001.

17 MR. KELLEHER: Your Honor, could I move into  
18 evidence, Exhibit 1078, assuming no objection.

19 MR. LINDVALL: No objection.

20 THE COURT: It's admitted.

21 (DTX-1078 is admitted into evidence.)

22 BY MR. KELLEHER:

23 Q. So it's up on the screen now, Mr. Neugebauer. Could  
24 you tell the jury what is happening here?

25 A. This was really major problem. It was really a

Neugebauer - direct

1 major problem. We have had a machine at Deutsche Airbus in  
2 Nordenham, and we have the problem that the machine, we are  
3 not able to feed fastener, so we have really a failure on  
4 the complete line. So, therefore, I have written very, very  
5 big letters, Please Help Us!

6 This is really urgent. We shut down the  
7 complete line because of the feeding systems.

8 Q. What kind of reaction do you get from a customer when  
9 Broetje's giant fastening machine shuts down because of the  
10 rivet feeding system?

11 A. At that time, they were so annoyed about it, they are  
12 already shouting at me about it, because I was in front of  
13 the customers there and they were shouting at me. So it is  
14 shown here, this is urgent.

15 Q. Could you turn to DTX-1080?

16 A. Yes.

17 Q. Is this another fault report from you to Mr. Bornes?

18 A. Yes.

19 MR. KELLEHER: Your Honor, I would move the  
20 admission of exhibit DTX-1080, assuming no objection.

21 MR. LINDVALL: No objection.

22 THE COURT: It's admitted.

23 (DTX-1080 is admitted into evidence.)

24 BY MR. KELLEHER:

25 Q. Mr. Neugebauer, could you tell the jury what this

Neugebauer - direct

1 fault report is about?

2 A. This is a fault report for our customer Shorts.

3 Today, they are named for McGee in Ireland. And we claim

4 there that all these cassettes have problems to feed

5 fastener. So the rivet sticks in the microactuator. There

6 a chamfer problem of the microactuator. Rivets sticks

7 during loading process in the fitting, so we were not able

8 to get rivets into the cassettes. And also the rivets there

9 were sticking in the tubes. And you see a lot of cassettes

10 there, so it was really a dramatic problem because we cannot

11 feed the machine rivets at that time.

12 Q. Mr. Neugebauer, I see at the bottom it says: We

13 expect a solution which do not look self-made. What do you

14 mean by that?

15 A. Some of the, some of the equipment we received were

16 really, have had the look and feel as a self-made. And what

17 we don't want to have is that somebody is working with a

18 kind of file on the microactuator or on the inlet of the

19 cassette, that it gets better. So we want to have a robust

20 solution on that. And that was the reason we have written

21 down: Please send me something which is not self-made.

22 Q. Could you please turn to Exhibit 1082 of your binder?

23 A. Yes.

24 Q. Is this a letter from you to Mr. Bornes and to Mr.

25 Girard at F2C2?

Neugebauer - direct

1 A. This is a fax to F2C2, yes.

2 MR. KELLEHER: I move the admission of DTX-1082.

3 MR. LINDVALL: No objection.

4 THE COURT: It is admitted.

5 (Exhibit DTX-1082 received in evidence.)

6 BY MR. KELLEHER:

7 Q. Could you explain what this document is?

8 A. We have fax'd certain reports, they are coming on the  
9 next page, they are fault reports. There are fault reports  
10 which we have sent to fix this equipment which was  
11 delivered.

12 Q. I have a question, Mr. Neugebauer. These fault  
13 reports, do they concern equipment that is being assembled  
14 at Broetje's facility in Germany or does it concern  
15 equipment that is on site at customers?

16 A. It is a concern on site of the customer. The fault  
17 report was generated by me but I received any information  
18 from our field engineers in Wichita where the machines were  
19 at that time.

20 Q. Could you turn to Exhibit 1088, please.

21 A. Yes.

22 Q. Is this also a fault report from you to Mr. Bornes?

23 A. Yes.

24 MR. KELLEHER: Your Honor, I move the admission  
25 of DTX-1088, assuming no objection.

Neugebauer - direct

1 MR. LINDVALL: No objection, Your Honor.

2 THE COURT: It is admitted.

3 (Exhibit DTX-1088 received in evidence.)

4 BY MR. KELLEHER:

5 Q. Would you please tell us, what is this fault report  
6 about?

7 A. This is also a fault report with fastener cassettes  
8 which we received from the customer Beck, where we had  
9 really constant feeding problems and we need to have rework.  
10 Line by line, I have not that much space on the page, so I  
11 have written in this way.

12 Q. It says Rework, what does that mean?

13 A. Rework. Just rework, that you make sure that the  
14 fastening, that the cassettes are working. So he has to do  
15 rework. Because of the massive amount of these cassettes, I  
16 don't want to explain for everything because of what needs  
17 to be done.

18 Q. Could you turn in your binder to DTX-1018.

19 A. Yes.

20 Q. Is this a letter from you to Mr. Bornes?

21 A. Yes.

22 Q. When is it dated?

23 A. It's dated October 5th, 2001.

24 Q. Do you remember this letter?

25 A. I remember this letter, yes.

Neugebauer - direct

1 MR. KELLEHER: Your Honor, assuming no  
2 objection, I would move the is admission of DTX-1018.

3 MR. LINDVALL: No objection.

4 THE COURT: It is admitted.

5 (Exhibit DTX-1018 received in evidence.)

6 BY MR. KELLEHER:

7 Q. Could you please tell me what this letter is about,  
8 Mr. Neugebauer?

9 A. So, actually, this was really kind of a wake-up call,  
10 not a call, but a letter, a wake-up letter is much better,  
11 to explain to him that we have so many problems with, for  
12 example, the Shorts machines, we have five machines at  
13 Shorts, five racks at Shorts.

14 So we were not really satisfied with the  
15 workmanship, as you can see, we have had constant problems.  
16 We have installed an acceptance test. And due to the  
17 problems, that we really were not relying on the acceptance  
18 test from Mr. Bornes, we had to carry out our own acceptance  
19 test, to take them out. That some of the cassettes had  
20 never seen any fasteners. Therefore, on the second page, at  
21 the end, that we really start to investigate other solutions  
22 for other companies of other rivet feeding systems, because  
23 we cannot accept that anymore. But we gave him also the  
24 option to sit down, to find other solutions to feed the  
25 rivets out of the fastener systems.



Neugebauer - direct

1 Q. This was sent in 2001?

2 A. Yes.

3 Q. Did you receive a response?

4 A. I believe we have then got together in a meeting to  
5 figure out what needs to be done to improve the system so  
6 that the system will work.

7 Q. Could you turn to DTX-1479.

8 A. Yes.

9 Q. What is this, Mr. Neugebauer?

10 A. This is a meeting, a report of minutes of meeting.

11 MR. KELLEHER: Your Honor, assuming no objection  
12 I would move DTX-1479 into evidence.

13 MR. LINDVALL: No objection, Your Honor.

14 THE COURT: It is admitted.

15 (Exhibit DTX-1479 received in evidence.)

16 BY MR. KELLEHER:

17 Q. Looking to the second page, Mr. Neugebauer, the  
18 meeting minutes?

19 A. Yes.

20 Q. There is a reference in Point No. 10 to Open Point  
21 List. Do you see that?

22 A. Yes.

23 Q. What is that?

24 A. We have started at some point in time to open an open  
25 point list, because with the fault reports, they were not

Neugebauer - direct

1 enough. So we started an open point, an action item list,  
2 to describe things he has to do and we have to do.

3 Q. And that Broetje has to do?

4 A. Yes, that Broetje has to do.

5 Q. Why would it include things that Broetje has to do?

6 A. There are some commercial items or project management  
7 items, timing items, to send information somehow about other  
8 projects.

9 Q. On the next page, there is a reference to Item No. 4,  
10 New Rack. What is that referring to?

11 A. Yes. During the years we have discussed with  
12 Philippe Bornes a new way of feeding the rivet out of the  
13 system. So instead of that these rotators where we have  
14 constantly problems over the years, we are required to have  
15 a slide, a slide according to our other feeding systems  
16 which we have had, which is based not on cassettes, which is  
17 based on containers.

18 Q. Containers?

19 A. Yes. So on this slide, we want to have to integrate  
20 this kind of slide into the system, and Mr. Bornes came up  
21 with the first sketch how it should look, and we had some  
22 recommendations, because we found out that from our point of  
23 view we need better guiding of the slide. Instead of one  
24 guide, we had to have two guides for the slides.

25 Q. Do you know whether they adopted having two points of

Neugebauer - direct

1 contact for the slide?

2 A. Yes, I believe so, if I remember right.

3 Q. Could you please turn to Exhibit 1090.

4 Is this another fault report?

5 A. Yes. This is another fault report.

6 MR. KELLEHER: Your Honor, assuming no

7 objection, I would move into evidence DTX-1090.

8 MR. LINDVALL: No objection, Your Honor.

9 THE COURT: It is admitted.

10 (Exhibit DTX-1090 received in evidence.)

11 BY MR. KELLEHER:

12 Q. Mr. Neugebauer, what is this fault about?

13 A. This is a fault report for a machine at Wichita. You  
14 see the amount of cassettes, I am not sure, maybe 20, 25  
15 cassettes, which are not fitting in the rack. We were not  
16 able to shift it in the rack.

17 So it seems to me that these cassettes were  
18 never in the rack before.

19 Q. Did the situation with F2C2 ultimately improve  
20 following this?

21 A. Yes. Of course, Mr. Bornes did something on the rack  
22 that we can shift the cassettes in this.

23 Q. He changed the rack?

24 A. No. They were not changing the rack, but a  
25 modification of the racking system.

Neugebauer - direct

1 Q. This was in 2001. So that the relationship continued  
2 on, obviously, after that?

3 A. Yes.

4 Q. Could you please turn to Exhibit DTX-1457.

5 A. Yes.

6 Q. Is this a letter from you to Mr. Bornes?

7 A. Yes.

8 Q. In January 2002?

9 A. Yes, sir.

10 MR. KELLEHER: Your Honor, assuming no  
11 objection, I would move DTX-1457 into evidence.

12 MR. LINDVALL: I would have to check. There is  
13 no foundation. It's not signed.

14 BY MR. KELLEHER:

15 Q. Are you the author of this document, Mr. Neugebauer?

16 A. Yes.

17 Q. Why did you write it?

18 A. Because Philippe Bornes announced alleged delivery of  
19 this process caused for us a major problem because we cannot  
20 start with the machines if the feeding system is not right.

21 Q. Mr. Neugebauer, when you wrote this letter, did you  
22 have knowledge what you were talking about in here?

23 A. Of course.

24 Q. Is it an ordinary part of Broetje's business to write  
25 letters like this to vendors?

Neugebauer - direct

1 A. Yes.

2 Q. Is it an ordinary part of Broetje's business to keep  
3 letters like this?

4 A. Yes.

5 Q. I notice this is not signed. Can you explain why?

6 A. The technology was just printing out and sign it and  
7 scan it and bring it back into the e-mail was not fixed at  
8 that time. We are talking about 2002. So there were, of  
9 course, a scanner. But it took so long. So we sent a  
10 letter out with e-mail without any signature.

11 MR. KELLEHER: Your Honor, I would move the  
12 admission of DTX-1457.

13 MR. LINDVALL: I still object. I don't think  
14 the foundation has been laid yet.

15 THE COURT: Overruled. DTX-1457 is admitted.

16 (Exhibit DTX-1457 received in evidence.)

17 BY MR. KELLEHER:

18 Q. Mr. Neugebauer, could you please explain what this  
19 letter is about?

20 A. The letter explained that we have tremendous problem.  
21 They are starting not to deliver the racks on time which we  
22 have ordered. So I warned him it is possible we would even  
23 start to get penalties from him because we have really had a  
24 major problem with the customer at the time. So that forced  
25 us to make sure that we are delivering our machines on time.

Neugebauer - direct

1 Q. Could you please turn to DTX-1094.

2 A. Yes.

3 Q. Is this another fault report from you?

4 A. Yes.

5 MR. KELLEHER: Your Honor, assuming no  
6 objection, could we offer DTX-1094 into evidence.

7 MR. LINDVALL: No objection.

8 THE COURT: It is admitted.

9 (Exhibit DTX-1094 received in evidence.)

10 BY MR. KELLEHER:

11 Q. Could you tell me what this report is about?

12 A. This is a fault report about Wichita. And we had  
13 sent, I am not sure if we have sent back, because that's  
14 early -- in any case, we have announced there is a problem  
15 with defective tubes, no escapement, only working with  
16 maximum pressure, the cassettes were not working and the  
17 customer refused them, rejected them.

18 Q. So to shift topics a little bit, Mr. Neugebauer, did  
19 there come a time when Broetje learned that it was not the  
20 only customer of F2C2?

21 A. Yes. There was a time that we figured out that Mr.  
22 Bornes -- let me start in a different way.

23 Mr. Bornes explained to me that he wanted to  
24 work with our heaviest competitor, Gemcor, which is really  
25 the heaviest competitor. We figured at that time he had

Neugebauer - direct

1 already sent cassettes to our customers and we didn't know  
2 that. But it was acceptable for us, as far Mr. Bornes, and  
3 Mr. Maylander talked about some provisions or something like  
4 that.

5 Q. What was your reaction to finding out that F2C2 was  
6 going to come dealing with Gemcor?

7 A. I wasn't present because of that.

8 Q. Could you explain why?

9 A. Together with Philippe, we have developed the system,  
10 and I was personally told that. I have written a command.  
11 And I have had also phone discussion with him about that.

12 Q. Did there come a time when Broetje decided to build  
13 its own automatic fastener feed system?

14 A. At some point in time we had started to think about  
15 it. It was never our intention. But having in mind these  
16 massive problems which we have had, the total massive  
17 problems that the customer also had, we had to come up with  
18 a different solution. That was not the way it should work.

19 Q. Do you remember approximately when that was?

20 A. 2003, something around 2003.

21 Q. Could you look at Exhibit DTX-1304. Can you tell me  
22 what this is?

23 A. This is an excerpt out of the presentation I have  
24 made for Vought Dallas in 2003.

25 Q. Who is Vought Dallas?

Neugebauer - direct

1 A. Vought Dallas is a customer. They are building a  
2 Dallas 787 aircraft parts.

3 Q. Were they building 787s back in 2003?

4 A. 747s.

5 MR. KELLEHER: Your Honor, assuming no  
6 objection, I would move into evidence DTX-1304.

7 MR. LINDVALL: No objection.

8 THE COURT: It's admitted.

9 (Exhibit DTX-1034 received in evidence.)

10 BY MR. KELLEHER:

11 Q. Mr. Neugebauer, could you translate this for us?

12 A. This is an excerpt out of the presentation for Vought  
13 in Dallas.

14 Q. Could we please look at the second page? Would you  
15 please explain what this page shows?

16 A. The picture shows the first set of design cassettes  
17 from our site, our intention was to design 50 new cassettes  
18 there, with 25 different fastener diameters and the system  
19 should be able to feed five shank diameters, which has  
20 nothing to do with the cassette at the time.

21 Q. Who attended this presentation?

22 A. The project management team from Vought in Dallas,  
23 and everybody who was involved in the project.

24 Q. Mr. Neugebauer, were you at all involved in Broetje's  
25 efforts to design its own automated fastener feed system?



Neugebauer - direct

1 A. Yes.

2 Q. Could you please describe your involvement?

3 A. I have given the design team ideas to start the  
4 design, bringing in all my experience we have gained with  
5 the system over the years.

6 Q. Was there any thought given by Broetje during this  
7 development project about patents belonging to other people?

8 A. At the very beginning, not. Later on, yes.

9 Q. What happened?

10 A. So, actually, we started to talk to suppliers for  
11 tubes, and we sent them some requests for information for  
12 tubes which we have designed on our own. At some point in  
13 time we started to ask Dr. Budach, which was our patent  
14 expert, to look at that, what we are doing to figure out if  
15 we have -- if there is any patent infringement.

16 Q. Why would you ask Dr. Budach to give you advice about  
17 that?

18 A. Just to make sure we are not infringing any patents.

19 Q. Why would you want to avoid patent infringement?

20 A. It's against the law. It was never our intention to  
21 do any patent infringement, of course.

22 Q. Did Dr. Budach give any advice concerning any patents  
23 belonging to AHG?

24 A. Yes. He responded on my question with the advice  
25 that we should change the design because we may infringe the

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1 patent from Philippe Bornes.

2 Q. Why don't we look at JTX-61.

3 Mr. Neugebauer, there is an English language  
4 translation in front of this, if you flip forward to page  
5 Doc 9, could you tell me if you recognize this document?

6 A. Yes.

7 Q. What is this document?

8 A. This document is the request for information, in  
9 principle, it is a request for information for a tube, which  
10 we have designed, where we are showing the design on the  
11 next page.

12 Q. Before you go on, Mr. Neugebauer, when was this  
13 letter sent?

14 A. This was sent in November 2003.

15 MR. KELLEHER: Your Honor, assuming no  
16 objection, I would move the admission of JTX-61.

17 MR. LINDVALL: No objection, Your Honor.

18 THE COURT: It's admitted.

19 (JTX-61 is admitted into evidence.)

20 MR. KELLEHER: Could we move forward to page 9?

21 BY MR. KELLEHER:

22 Q. So Mr. Neugebauer, this is the page in German. What  
23 date was this sent?

24 A. In November 2003.

25 Q. And could you flip forward to page 11?

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1 A. Ya.

2 Q. What is this?

3 A. In fact, this is a cross section of a tube which we  
4 have designed to fulfill at that time our requirements.

5 Q. Okay. And why were you sending this to a third  
6 party?

7 A. Because the third party was the supplier of the  
8 tubes, foreseen supplier of the tubes.

9 Q. Could you please look at DTX-1599?

10 A. Yes.

11 Q. Do you know what this document is?

12 A. This is a document in which we require the supplier  
13 for the tubes to have a different shape of the tube.

14 MR. KELLEHER: So, your Honor, assuming there is  
15 no objection, I would move DTX-1599 into evidence.

16 MR. LINDVALL: No objection, Your Honor.

17 THE COURT: It's admitted.

18 (DTX-1599 is admitted into evidence.)

19 BY MR. KELLEHER:

20 Q. So Mr. Neugebauer, what is the date of this e-mail?

21 A. 19th of November, 2003.

22 Q. A few weeks after the previous one?

23 A. Two weeks, Ya. Almost.

24 Q. Could you please turn to the next page, page 2?

25 A. Ya.

Neugebauer - direct

1 Q. So what is that in the middle of the page?

2 A. This is also a cross section from a tube but instead  
3 of these grooves, we have then changed the design to a soft  
4 pentagon because of the recommendation said from Mr. Budach  
5 to avoid any possible infringement of the patent.

6 Q. So what did Dr. Budach do to make the company request  
7 this change?

8 I'll ask that again. What was it that  
9 Dr. Budach said to make the company request this change from  
10 the tube manufacturer?

11 MR. LINDVALL: Objection, Your Honor. Hearsay.

12 MR. KELLEHER: It's not offered for the truth of  
13 the words spoken, Your Honor.

14 THE COURT: Overruled.

15 BY THE WITNESS:

16 A. In fact, he give us the order to avoid any possible  
17 infringement of the patent. We have to redesign the tube to  
18 come up with the kind of soft pentagon.

19 Q. What did the company do in response to that direction  
20 from Dr. Budach?

21 A. Ya, we immediately changed it a couple days, a day  
22 later to this design here, what we are showing here in this  
23 picture.

24 MR. KELLEHER: I don't have any more questions  
25 right now, Your Honor.

Neugebauer - cross

1 THE COURT: Cross-examination.

2 CROSS-EXAMINATION

3 BY MR. LINDVALL:

4 Q. Good afternoon, Mr. Neugebauer. If I pronounce it  
5 wrong or your name wrong, I apologize.

6 A. You did it correctly.

7 Q. Now, Mr. Kelleher was just talking to you about  
8 Exhibit JTX-61.

9 Can we please put it on the screen, please.

10 A. Yes.

11 Q. And this is dated November 3rd, 2003?

12 A. Ya.

13 Q. And this is about six months after Broetje had  
14 already started their own development of the cassette;  
15 correct?

16 A. Something like that, Ya.

17 Q. Now, if we could turn to JTX-61.11. Page 11.

18 And is this a copy of AHG's tube, right here?

19 A. This is our own development for that. You see that  
20 this is the own complete own design there.

21 Q. Okay. Did you look at AHG's tube to come up with  
22 this design?

23 A. Not really.

24 Q. Not really? Okay. So this looks nothing like AHG's  
25 tube; is that correct?

Neugebauer - cross

1 A. I wouldn't say that.

2 Q. It does look like AHG's tube then?

3 A. No, this is our own design.

4 Q. But have you seen AHG's tube design before?

5 A. Not in this cross-section. In reality, yes. Not in  
6 the cross-section.

7 Q. Okay. AHG has an pentagon; correct?

8 A. On this groove design, yes.

9 Q. Okay. And you have a pentagon in your ultimate  
10 design, too; correct?

11 A. I can't really say that.

12 Q. I believe you used the word "soft pentagon;" correct?

13 A. Soft pentagon, Ya.

14 Q. Is that word "soft pentagon" used in any of the  
15 documents that we talked about today?

16 A. I have not seen the soft pentagon mentioned in the  
17 document.

18 Q. When did you first start using the words "soft  
19 pentagon?"

20 A. Very early.

21 Q. How early?

22 A. When we started to design the soft pentagon.  
23 Somebody came up with the idea this was a soft pentagon.

24 Q. Is there something in writing here that we can see?

25 A. I don't -- I haven't seen that.

Neugebauer - cross

1 Q. Now, I believe your testimony was then, if we move to  
2 JTX -- no, DTX-1599.

3 A. (Witness complies.)

4 Q. Do you see this?

5 A. Ya.

6 Q. And we just talked about this; right?

7 And if you turn to page 3. And if you can blow  
8 that up a little bit.

9 Is that the soft pentagon?

10 A. Ya, as you can see there.

11 Q. Okay. And is that, for example, accurate of what  
12 Broetje's tube looked after -- well, is that an accurate  
13 depiction of what Broetje's tube looked like after it  
14 finished its development and began selling it?

15 A. Ya, it's very accurate.

16 Q. Pardon?

17 A. It's very accurate.

18 Q. Thank you. Now, did you have any discussions with  
19 Dr. Budach about the design yourself?

20 A. Not really. Just give us a hint that there is an  
21 infringement possible on the AHG groove. So when we started  
22 to look into other patents to see if there, if we may be  
23 infringing other patents, of course, and figure out what is  
24 now the real technology behind that, what is the real need  
25 to create this kind of soft pentagon.

Neugebauer - cross

1 MR. LINDVALL: Just a moment.

2 (Counsel confer.)

3 BY MR. LINDVALL:

4 Q. I'm sorry. I'm a little disorganized here.

5 A. No problem.

6 MR. LINDVALL: If I may approach, Your Honor?

7 THE COURT: You may.

8 (Document passed forward.)

9 BY MR. LINDVALL:

10 Q. Okay. I just handed you what has marked as PTX-579.

11 Did you see this document before?

12 A. No.

13 Q. Do you see there at the top, it says in consultation  
14 with Mr. Neugebauer on 11/6/2003? Do you see the first  
15 sentence there?

16 A. Ya.

17 Q. And I assume that is you; correct?

18 A. Ya.

19 Q. And do you recall having any discussions with, is it  
20 Volk, Mr. Volk, around this time frame?

21 A. I just need to look at it.

22 Q. Sure.

23 A. So there was a, there a was a patent investigation.

24 Q. Now, you were involved in this; correct?

25 A. I have discussed it with Mr. Budach, as he is



Neugebauer - cross

1 explaining here.

2 Q. Now, who wrote this memo? Can you tell?

3 A. No.

4 Q. Well, do you see the second page at the bottom?

5 Mr. Volk, V-o-l-k?

6 A. I don't know. It was something Mr. Budach has dealt  
7 with. He may ask Mr. Budach about.

8 MR. LINDVALL: I move to admit this document.

9 MR. KELLEHER: No objection, Your Honor.

10 THE COURT: It's admitted, PTX-579.

11 (PTX-579 is admitted into evidence.)

12 BY MR. KELLEHER:

13 Q. Now, look at the front page of this document. And  
14 the title at the top is: Cassette/F2C2 magazine. Do you  
15 see that?

16 A. Yes.

17 Q. And a magazine is a cassette; right?

18 A. No, a cassette is a cassette.

19 Q. What is a magazine then? Is that like something in a  
20 paper magazine?

21 A. I don't know.

22 Q. Okay. So you don't have an understanding of what the  
23 cassette/F2C2 magazine is?

24 A. I don't know why it is written there. It is a  
25 cassette. We are talking about a cassette.

Neugebauer - cross

1 Q. Well, let's look at the German. Were you looking at  
2 the German version here? We have the English version here,  
3 so you understand that. What does the word "magazine" in  
4 German as stated there?

5 A. Magazine is something where you are storing  
6 something.

7 Q. Okay. Storing something. So it says: In  
8 consultation with Mr. Neugebauer on November 6th, 2003.

9 And you said you had -- did you have a  
10 consultation with Mr. Volk?

11 A. No, I cannot remember. We have, I remember that we  
12 have several sit-togethers with Mr. Budach, Dr. Budach.

13 Q. So if we turn to the next page, and a little bit  
14 further down. You don't remember having a consultation with  
15 Mr. Volk in 2003?

16 A. I'm not sure about that.

17 Q. You're not sure. Okay. Let's go back to the front  
18 page, please.

19 Do you recall having a consultation with him:  
20 of particular importance is the profiled tube in the  
21 cassette as well as the general structure.

22 A. Ya. It may, may be something which we may have  
23 discussed with Mr. Volk just to explain where we are. That  
24 he has made the order to investigate into the patents,  
25 clearly.

Neugebauer - cross

1 Q. And that was of particular importance; correct?

2 A. Something like that, Ya.

3 Q. And down here, this paragraph here, it says: A  
4 cassette with tube and grooves is under patent protection in  
5 AHG's property right -- and that's the European patent  
6 number. AHG -- again that's the European patent -- protects  
7 a magazine with tube and grooves in connection with a rivet  
8 selecting system.

9 Did you ever review these patents?

10 A. Ya. It was the order from Mr. Budach what I told.  
11 What is the point now? I have explained that we have, after  
12 we receive the information, the formal information, that we  
13 cannot use this tube because we are maybe infringing the  
14 patent. We have changed it to the soft pentagon.

15 Q. Okay. So you have changed from a pentagon to a soft  
16 pentagon; is that correct?

17 A. No, we are changing from grooves to a soft pentagon.

18 Q. I thought you said --

19 A. Grooves, five grooves. Five grooves are not maybe  
20 pentagon. The pentagon is what you see there.

21 Q. Well, you have a soft pentagon; correct? You do call  
22 it a pentagon shape; correct?

23 A. You have a pentagon shape. Soft pentagon.

24 Q. Now, you could have -- there almost an infinite  
25 amount of shapes that Broetje could have used other than a

Neugebauer - cross

1     pentagon; correct? You could have used six sided, eight  
2     sided, ten sided, three sided; correct? You could have used  
3     any of those sides; correct?

4     A.     But you have to produce them all.

5     Q.     My question is you could produce any of those sides?

6     A.     We can also use maybe also other side tubes, yes.

7     Q.     And you choose to use the pentagon shape which you  
8     call the soft pentagon shape; correct?

9     A.     Right.

10    Q.     Now, let's switch gears for a minute. Let's go to  
11    these fault reports. Let's turn to, for example, DTX-1080.

12                 And I believe you testified about this, and  
13    there is a list of cassettes here; correct?

14    A.     Ya.

15    Q.     And I'm guessing there is about, what, 12, 14  
16    cassettes there; is that correct?

17    A.     Probably, Ya.

18    Q.     Approximately?

19    A.     Maybe it's 16 cassettes.

20    Q.     And we saw four or five of these; correct? It's in  
21    your testimony.

22    A.     Of the fault reports.

23    Q.     Yes.

24    A.     Probably more, Ya.

25    Q.     We may have gone through six then. I can bring you

Neugebauer - cross

1 through with them.

2 A. I'm comfortable with six.

3 Q. Okay, six. And you see these serial numbers here for  
4 the cassette?

5 A. Yes.

6 Q. Are you aware that every time that AHG made a  
7 cassette, the serial number was unique to that cassette?

8 A. Stated that way, there was a kind of method to give  
9 them the serial number, yes.

10 Q. Yes. And you probably heard -- well, you did hear  
11 Mr. Bornes' testimony if you were here for his testimony,  
12 but, for example, this cassette here, 3626 was the 3,626  
13 cassette made by AHG and given to you guys. Okay? So today  
14 we saw about five or six fault reports which we could go  
15 through and we probably came up with 40 or 50 defective  
16 cassettes out of about 2,500 to 3,000 cassettes; correct?

17 A. No, that's not true.

18 Q. Oh. I'm just saying do you understand that the  
19 AHG -- I mean that Broetje received about 2,500 to 3,000  
20 cassettes; is that correct?

21 A. You are just referring to something.

22 Q. Mr. Neugebauer, that's not the answer to my question.  
23 Listen to my question. You understand by the serial number  
24 that Broetje received, this here shows you received over  
25 2,500 cassettes; right?

Neugebauer - cross

1 A. I have never counted the cassettes.

2 Q. Okay. You never counted cassettes. Thank you.

3 Now, let's turn to DTX-1013.04.

4 And I believe you testified this was a  
5 presentation at Vought in Dallas, Texas? I'll give you a  
6 chance to get there.

7 A. (Witness complies.)

8 Q. And this was on, to get this right, January 23rd,  
9 2003; correct?

10 A. It is mentioned there. You may be right. I cannot  
11 really remember when we were at Vought in Dallas.  
12 Definitely in 2003, yes.

13 Q. Yes, you can't quite remember if it was January or  
14 February or March. Some time in 2003?

15 A. Yes.

16 Q. Okay. You are not sure if that date is correct;  
17 right?

18 A. Right.

19 Q. Now, let's turn to the next page.

20 And this is a cassette; correct?

21 A. This is a cassette, right.

22 Q. Right. And the cassette you have there has colored  
23 bands like AHG; correct? Do you see the color bands there?

24 A. This was an example of a cassette, Ya.

25 Q. And it has the black handle like AHG; correct?

Neugebauer - cross

1 A. At that time, yes.

2 Q. But you decided not to put AHG's branding on there,  
3 did you?

4 A. No.

5 Q. Okay.

6 A. Because it was our design. It had nothing to do with  
7 AHG.

8 Q. This is your own design?

9 A. Yes.

10 Q. Okay. And this document -- well, we're not sure what  
11 the date of the document is or you are not sure. But  
12 according to the document, it was January 23rd, 2003, and  
13 you didn't start developing your own cassette until six  
14 months later; correct?

15 A. No.

16 Q. In June 2003?

17 A. No, we started maybe a little bit earlier. So in  
18 2003. Let's keep these wording.

19 MR. LINDVALL: Okay. So let's look at JTX-14.  
20 If you could turn to the next page, please, page 2.

21 BY MR. LINDVALL:

22 Q. Have you seen this document before?

23 A. Yes.

24 Q. Okay. And this is dated June 23rd, 2003; correct?

25 A. That is what it says, Ya.

Neugebauer - cross

1 Q. And this is when you began development of your own  
2 cassette; correct?

3 A. Maybe, yes.

4 Q. Maybe? So you are not quite sure if it actually  
5 started on June 23rd of 2003?

6 A. Well, you have a meeting, an internal meeting to show  
7 this document may be on the 23rd of 2006, or June of 2003.

8 Q. But it was a long time ago, so it's hard to remember  
9 exactly?

10 A. Ya.

11 Q. Let's look as DTX-1018. There was some testimony  
12 about this document, correct, earlier with your counsel?  
13 You recall that? Do you recall you testified about this  
14 document?

15 A. We have talked about that.

16 Q. This is dated when? This is dated October 5, 2001?

17 A. Yes.

18 Q. And I guess based on what you have testified before,  
19 you are not quite -- maybe sometime in 2001 you sent this  
20 letter?

21 A. No. This is definitely on October 5th.

22 Q. The presentation you gave you are not quite sure, but  
23 this one you definitely know, 14 years ago, you sent this on  
24 October 5th, 2001. Correct?

25 A. Yes.



Neugebauer - cross

1 Q. You specifically remember that. Right?

2 A. No, no.

3 Q. You don't remember sending this letter. Is that  
4 correct?

5 A. I remember that I sent the letter. I see the date is  
6 on top here.

7 Q. There is no fax header on this, is there?

8 A. No.

9 Q. If you turn the page of this document, there is no  
10 signature to this document, is there?

11 A. There is no signature. As I explained before --

12 Q. I know you explained before --

13 A. Sorry. Let me finish my point.

14 Q. I didn't ask you why, Mr. Neugebauer.

15 THE COURT: You will have a chance to answer  
16 when your attorney asks questions.

17 BY MR. LINDVALL:

18 Q. You didn't sign this document. Correct?

19 A. At that time it was not feasible to do that.

20 Q. And at this time you did not fax this document.  
21 Correct?

22 A. I sent it by mail, because --

23 Q. You didn't fax it. Correct?

24 A. I didn't fax it.

25 Q. But you were faxing documents around this time frame.

Neugebauer - cross

1 Correct?

2 A. Yes.

3 Q. You decided not to fax this one. Correct?

4 A. Possibly.

5 Q. Now, bear with me for a minute. You can never find  
6 something when you want to find it.

7 If you could look at PTX-657. It's already in.  
8 This is an e-mail the jury hasn't seen today. If we blow up  
9 the top here. This is an e-mail from yourself. Correct?

10 A. Yes.

11 Q. And this was sent in July 2003. Is that correct?

12 A. Yes.

13 Q. And let's go to the body, let's go to this part right  
14 here. You are writing to Mr. Bornes. Is that correct?

15 A. Yes.

16 Q. Mr. Bornes, sitting right over here. Correct?

17 A. Yes.

18 Q. And you say to Mr. Bornes, "PS. Just between you and  
19 me" -- you are keeping this conversation between you and Mr.  
20 Bornes?

21 A. That's what it says.

22 Q. "The company is very, very deeply unsatisfied  
23 concerning the situation with Gemcor."

24 At this point in time, Broetje was very, very  
25 deeply unsatisfied because AHG was dealing with Gemcor.

Neugebauer - cross

1 Correct?

2 A. Yes.

3 Q. And it says here, "There are several discussions in  
4 house, also with our mother company." The mother company is  
5 CLAAS. Correct?

6 A. No. The CLAAS Fertigungswerke. It was CLAAS  
7 Fertigungswerke.

8 Q. Part of the CLAAS group. Correct?

9 A. Yes.

10 Q. "So there are several discussions in house also with  
11 our mother company how to react on that obstacles."

12 So you had involved CLAAS -- pronounce that  
13 second word you said?

14 A. CLAAS Fertigungswerke.

15 Q. You and that company were going to have discussions  
16 about this, correct, and how to react to the obstacle?

17 A. Not really. I just have to send this because I want  
18 to put them further under pressure at that time.

19 Q. These discussions actually weren't going on in house?  
20 This is something you told him?

21 A. The discussions weren't in house going on.

22 Q. You told Philippe there were several discussions in  
23 house, but in fact there weren't. Is that correct?

24 A. Yes.

25 Q. And do you typically do that in e-mails and letters,

Neugebauer - cross

1 where you say something that is actually not true?

2 A. Not really.

3 Q. But you did it this time, though. Yes?

4 A. To put him under pressure, yes.

5 Q. To put someone under pressure, you might put an  
6 untruth there?

7 A. To put him under pressure.

8 Q. You may say an untruth to put someone under pressure?

9 A. There may also have been some discussion with CLAAS  
10 that, We really regret it. Mainly I sent it to put him  
11 under pressure to consider what he is doing there.

12 Q. What you did, you basically told him a lie to put him  
13 under pressure. Correct? Correct?

14 A. Not really.

15 Q. Well, you just told me these several discussions in  
16 house weren't going on, the only reason you put it in there  
17 was to put him under pressure?

18 A. I put it there to put him under pressure and there  
19 may be some discussion with CLAAS Fertigungswerke. I cannot  
20 really personally remember.

21 Q. "It seems to be that there is a possibility that we  
22 will quit the relationship with you. You should really  
23 think about a possible solution. It's my opinion."

24 So you are basically telling Mr. Bornes you  
25 better quit selling to Gemcor or we are going to make our

Neugebauer - cross

1 own cassette or we are going to do something else. Correct?

2 A. In principle, yes, that's right.

3 Q. And, in fact, you end up quitting your relationship  
4 because Mr. Bornes and AHG would not drop their relationship  
5 with Gemcor. Correct?

6 A. Yes. We have so many years together --

7 Q. I am not asking for a long explanation. I am just  
8 saying, you quit -- let me withdraw that question.

9 Broetje decided to stop its relationship with  
10 AHG because AHG had decided to do dealings with Gemcor.  
11 Correct?

12 A. Not at that time.

13 Q. Well, you said there is a possibility?

14 A. Yes. It's my opinion it is a possibility, yes.

15 Q. Now, what is the date on this again, please? This is  
16 July 2003. Right?

17 A. Yes.

18 Q. Is that July 29th, 2003?

19 A. July 29, 2003.

20 Q. Let's go back to JTX-14, please. This is  
21 development, a month before you sent this e-mail. Correct?  
22 June 23, 2003?

23 A. We have started to investigate other solutions. At  
24 that time we knew Philippe Bornes wanted to deal with  
25 Gemcor. So we had started to investigate other solutions.

Neugebauer - cross

1 Q. My question is, you began the development -- look at  
2 the second page of this document, please. What is this in  
3 English?

4 A. Development of an innovative rivet feed technology.

5 Q. So you had begun development of that as of June 23,  
6 2003?

7 A. Yes, but not with the cassette at that time really.

8 Q. Let's look at Page 19 of this document.

9 Page 1. Whose cassette is that?

10 A. That is an AHG cassette as an example.

11 Q. As an example, correct.

12 Let's go to the next page. Whose cassette is  
13 that?

14 A. That's also an AHG cassette as an example.

15 Q. Let's go to the next page?

16 A. As well.

17 Q. And what's the next page?

18 A. As well.

19 Q. You have seen this document. Correct? Before?

20 A. Yes. I saw something like that.

21 Q. You said AHG cassettes is in there. There is no  
22 other example in this complete development document other  
23 than an AHG as an example. Correct?

24 A. Yes.

25 MR. LINDVALL: No further questions.

Neugebauer - redirect

1 THE COURT: Redirect.

2 REDIRECT EXAMINATION

3 BY MR. KELLEHER:

4 Q. Very briefly, Mr. Neugebauer.

5 I am going to put up again PTX-657. Mr.  
6 Lindvall was asking you about that a moment ago.

7 In that paragraph where you said, PS, I think  
8 the discussion got a bit confused there. I want to make  
9 sure the transcript is clear. You said there are several  
10 discussions in house.

11 A. Yes.

12 Q. Were there discussions in house?

13 A. Yes.

14 Q. What kind of discussions?

15 A. So that Philippe has explained to Maylander and to  
16 myself that we want to in principle sell the technology to  
17 our heaviest competitor.

18 Q. And people within Broetje were talking amongst  
19 themselves about that?

20 A. Yes.

21 MR. KELLEHER: Nothing further, Your Honor.

22 THE COURT: You may step down.

23 (Witness excused.)

24 THE COURT: Call your next witness.

25 MR. KELLEHER: Your Honor, I think at this point

Auriol - designations

1 we have some videotape deposition to play.

2 THE COURT: About how long do you expect that  
3 will be?

4 MR. KELLEHER: Four different witnesses, Your  
5 Honor. I thought we should split it up, Your Honor. The  
6 first one is about ten minutes, I believe.

7 THE COURT: Let's do that first one, then we  
8 will take our break.

9 MR. KELLEHER: This will be Jean-Marc Auriol.

10 (Designations placed in record.)

11 "Question: As of today, what percentage of the  
12 revenue for AHG comes from selling rivets?

13 "Answer: About 85 percent.

14 "Question: Does AHG sell rivet cassettes?

15 "Answer: Not that I know of.

16 "Question: Does it sell filling stations to put  
17 rivets into the cassettes?

18 "Answer: No.

19 "Question: Does it sell --

20 "Answer: No, that's done by F2C2.

21 "Question: Right. And just for completeness, I  
22 will ask does AHG sell the racks into which the cassettes  
23 slide?

24 "Answer: Neither. No. No, it's still F2C2  
25 which does that.



Auriol - designations

1 "Question: So those three items, the cassettes,  
2 the filling stations and the racks, those are sold by F2C2?

3 "Answer: The entire system is manufactured by  
4 F2C2.

5 "Question: Mr. Auriol, I suppose it's  
6 worthwhile getting on the record, but did the United States  
7 Patent Office make a mistake and spell your name incorrectly  
8 on the two patents?

9 "Answer: Absolutely. I'm not sure it's on  
10 both.

11 "Question: I think the European Patent Office  
12 got it right.

13 "Answer: On this one there's no mistake. It's  
14 Aurtoi also here. Indeed.

15 "Question: But it's you?

16 "Answer: We cannot hide anything from you.

17 "Question: So I think the -- there was a patent  
18 application filed in France in 1988. Is that correct?

19 "Answer: It's very possible, yes.

20 "Question: That was December 1988, does that  
21 sound correct?

22 "Answer: Yes. It doesn't shock me.

23 "Question: So it would have been before this  
24 testing was done?

25 "Answer: Before or during the filing of the

Auriol - designations

1 patent, because you do tests which allowed us to have a  
2 machine with 100-meter-long tube, but before that, we had a  
3 machine that produced much shorter tubes and it was much  
4 easier.

5 "Question: Do you remember, to the best of your  
6 memory, how long before this December 1988 filing date that  
7 this process began?

8 "Answer: Several months.

9 "Question: So now before, before clients came  
10 and were complaining that there were these false brothers  
11 mixed together, did you have any experience in rivet-feeding  
12 systems?

13 "Answer: Not systems based on a tube, for sure.

14 "Question: Now, were you aware that people in  
15 the past had used rivets -- I'm sorry, had used tubes for  
16 holding and feeding rivets?

17 "Answer: I don't have any experience in  
18 particular in relation to that. Putting a rivet inside a  
19 tube is not terribly original in itself. The issue is to  
20 manage to make it move.

21 "Question: Right. Why do you need to put  
22 things at the end of the tubes?

23 "Answer: So as to avoid that the rivets leave  
24 the tube by themselves.

25 "Question: So that is just something you would

Auriol - designations

1 automatically think of?

2 "Answer: You need to design a system, yes, for  
3 that.

4 "Question: So I'll ask this question: Would a  
5 square internal passageway have longitudinal passageways or  
6 grooves?

7 "Answer: It's obvious.

8 "Question: And is the answer obviously yes?

9 "Answer: I don't know. No, because you have to  
10 compare this with the text of the patent. Anyway, what is  
11 important is to have airflow. In fact, if you wanted, you  
12 could have circulation of air in a double-wall element with  
13 the communication holes which would make it work perfectly.  
14 So you can, you know, think of different, you know,  
15 possibilities with a pentagon and hexagon, a square, any  
16 kind of shape.

17 "Question: Do you know if anyone used cassettes  
18 with coiled tubes of rivets before AHG?

19 "Answer: With tubes and grooves, certainly not.

20 "Question: Do you understand that it is not a  
21 violation of United States law to have a product that has  
22 four of five patent claim limitations?

23 "Answer: For me it sounds a bit like Chinese.  
24 You know, it's -- it's a technical language for me and I'm  
25 not a technician of patent law.

Auriol - designations

1           "Question: So what I'm -- one thing I'm curious  
2           about is there is a phrase in your patents that in the  
3           European patent is Unguidageperi Pherique. In the English  
4           language, that is called "peripheral guidance."

5           "If someone wanted to make a tube for rivets  
6           that would not have peripheral guidance, what should they  
7           do?

8           "Answer: I don't know.

9           "Question: Does every tube have peripheral  
10          guidance?

11          "Answer: It all depends on the diameter of the  
12          tube in relation to the diameter of the rivets.

13          "Question: So if the diameter is too big of the  
14          tube, then there would not be peripheral guidance. Is that  
15          correct?

16          "Answer: I don't understand what you mean.

17          "Question: Well, you indicated that it depends  
18          upon the diameter?

19          "Answer: Yes, of the relationship between the  
20          diameters.

21          "Question: Okay. And so could you explain the  
22          point at which the relationship changes from being one of  
23          peripheral guidance to not peripheral guidance?

24          "Answer: I have no idea what is the meaning of  
25          your question. I don't understand what you are asking me.

Auriol - designations

1           "Question: If I were to look at a tube, say it  
2           has a circular inside, and let's say that the inside of the  
3           tube is two centimeters and I put inside of it a rivet that  
4           has a head of one centimeter. And we will say that the  
5           shank of the rivet is three millimeters -- three  
6           centimeters.

7           "Answer: Okay.

8           "Question: And if I were to apply compressed  
9           air in that tube, as the rivet flowed through the tube,  
10          would there be peripheral guidance?

11          "Answer: Once again, it would be pure  
12          speculation because the purpose and the interest of this  
13          patent is not to guide or pilot one rivet, but a column of  
14          rivets, and that's it. Now, you can think of anything, but  
15          you would have to try it out to see if it works.

16          "Question: Does the concept of peripheral  
17          guidance have any particular meaning to you in the field of  
18          rivet-feeding devices?

19          "Answer: I'd like to know what it means for  
20          you.

21          "Question: I honestly don't know.

22          "Answer: Me neither.

23          "Question: The top of the cassette is clear  
24          plastic. Is there a reason for that?

25          "Answer: Well, for one thing, so that you can

Auriol - designations

1 see through it.

2 "Question: So that, for example, you --

3 "Answer: Because on the operational level you  
4 have a tube that is clear or transparent, which allows you  
5 to see the rivets moving through it, and if you have a  
6 problem of rivets not moving through the tubes, then you can  
7 see why. And therefore, in order to be able to see the tube  
8 on one side of the cassette, you need to have a clear or  
9 transparent side. That allows also to make this different  
10 from similar things by putting the names AHG and F2C2 on it.

11 "Question: The walls on the sides of the  
12 cassette, the F2C2 cassette, are made of metal. What is the  
13 reason for that?

14 "Answer: No. Why should they not be made of  
15 metal?

16 "Question: This is United States Patent  
17 4,662,206, to Mauer, M-A-U-E-R, and it is entitled  
18 Rivet/Feeder. Could you please look at figure number 6.

19 "If I was to use figure number 6 as the tube for  
20 feeding a rivet, would there be longitudinal passageways or  
21 grooves?

22 "Answer: My attorney is perfectly right, and I  
23 prefer not to answer.

24 "Question: At first, I don't have anything that  
25 tells me what this drawing corresponds to. I would have to

Auriol - designations

1 read the text to know that. So I don't know where we're  
2 going with this.

3 "Question: In your patent do you have any tubes  
4 shaped like this?

5 "Answer: No, there's no shape like this  
6 one, which is a particular shape.

7 "Question: I'm merely trying to find out  
8 whether, if I placed a circular rivet head in the middle of  
9 this tube, would, for example, there be a longitudinal  
10 passageway at the very top?

11 "Answer: You know the answer.

12 Question: What is it?

13 "Answer: Of course the air flows through.

14 "Question: So the answer is yes.

15 "Answer: Your question is pernicious.

16 "Question: If my client used a tube with this  
17 shape, would you still be suing them?

18 "Answer: Why didn't you do it?

19 "Question: Could you please answer my question?

20 "Answer: I choose not to answer this question."

21 (Designations end.)

22 THE COURT: Okay. I think it's a good time for  
23 our afternoon break for the jury. No talking about the  
24 case. I will see you back here in a little bit.

25 (Jury left courtroom.)

1 THE COURT: All right. Most of you can probably  
2 have a break. We are going to give Mr. Kelleher an  
3 opportunity to make the argument on the motion that was made  
4 earlier today. I am going to charge you for this time.

5 MR. KELLEHER: Your Honor, we would move under  
6 Rule 50(a) for judgment as a matter of law on the trade  
7 dress infringement and unfair competition claims.

8 AHG failed to prove that the product configuration  
9 of its cassette is non-functional.  
10 AHG presented no evidence that the product configuration of  
11 the cassette had acquired secondary meaning in the U.S. before  
12 Broetje used the alleged trade dress in commerce in the United  
13 States.

14 AHG presented no evidence that any consumers are  
15 likely to confuse the source of the AHG's cassette with that  
16 of the Broetje's parties cassette.

17 AHG failed to prove that it is the owner or the  
18 senior user of the alleged trade dress because AHG failed to  
19 prove that the Broetje parties cassettes infringed AHG's  
20 alleged trade dress.

21 AHG also fails to prove its unfair competition  
22 claims.

23 Concerning intentional interference with  
24 perspective economic advantage.

25 AHG presented no evidence that either of the



1 Broetje parties knew that AHG and any third party were in  
2 an economic relationship that probably would have resulted  
3 in an economic benefit to AHG.

4 AHG failed to prove that the Broetje parties  
5 engaged in wrongful conduct through trade dress infringement  
6 or patent infringement which we contend is preempted.

7 AHG presented no evidence that either of the  
8 Broetje parties intended to disrupt the relationship or that  
9 any relationship was in fact disrupted.

10 AHG failed to prove that the Broetje parties  
11 conduct, wrongful or otherwise, was a substantial factor in  
12 causing AHG's alleged harm.

13 Concerning nonpatent damages, Your Honor.

14 AHG presented no evidence that it is entitled to  
15 recover actual damages for:

16 One, injury or loss to AHG's reputation.

17 Two, injury or loss to AHG's goodwill.

18 Three, lost profits that AHG would have earned  
19 but for the Broetje parties alleged infringement.

20 Four, the expense of preventing customers from  
21 being deceived. And,

22 Five, the cost of future corrective advertising  
23 reasonably required to correct public confusion caused by  
24 the infringement.

25 AHG presented no evidence it is entitled to

1 recover the Broetje parties profits from using the alleged  
2 trade dress in the sale of rivet cassettes or any other  
3 product.

4 AHG failed to present evidence that the Broetje  
5 parties used AHG's alleged trade dress intentionally knowing  
6 it was an infringement.

7 AHG presented no evidence that:

8 One, either of the Broetje parties engaged in  
9 unfair competition and/or that they did so with malice,  
10 oppression or fraud, and/or

11 Two, either of the Broetje parties engaged in  
12 intentional interference with AHG's prospective economic  
13 advantage and/or that it did so with malice, oppression,  
14 fraud.

15 AHG failed to prove that before May 12, 2006, it  
16 did not discover or did not know the facts that would have  
17 caused a reasonable person to suspect that it suffered harm  
18 in the U.S. that was caused by trade dress infringement or  
19 unfair competition under the Lanham Act.

20 AHG failed to prove that before May 12, 2007, it  
21 did not discover and did not know facts that would have  
22 caused a reasonable person to suspect that it suffered harm  
23 in the U.S. that was caused by unfair competition under  
24 common law or intentional interference with perspective  
25 economic advantage under California state law.

1           The expert testimony and the report proffered in  
2 support of the damages claim is unreliable and overstated.

3           AHG has not proved it is entitled to any  
4 injunctive relief.

5           AHG produced no evidence:

6           One, that it suffered irreparable injury.

7           Two, the remedies available at law are  
8 inadequate to compensate for the injury,

9           Three, considering the balance of hardships  
10 between it and the Broetje parties, a remedy in equity is  
11 warrant.

12           Last, concerning the patents.

13           No reasonable jury could find that the tube in  
14 the Broetje parties rivet cassettes directly infringed the  
15 asserted claims of the '216 patent or the '339 patent.

16           AHG failed to prove that all of the elements of  
17 any of the asserted claims were met by Broetje's cassettes.

18           No reasonable jury could find that either of  
19 the Broetje parties induced a third party to infringe the  
20 asserted claims of the '339 patent.

21           AHG -- used throughout this speech, Your Honor,  
22 to mean both AHG or F2C2 or both -- failed to prove that a  
23 third party directly infringed the '339 patent.

24           AHG presented no evidence that either of the  
25 Broetje parties took action during the time the '339 patent

1 was enforced intending to cause any third party to perform  
2 infringing acts.

3 AHG presented no evidence that either of the  
4 Broetje parties, one, knew that the act as taken would  
5 constitute infringement of the '339 patent, or subject to,  
6 we believe, that there is a high probability that the acts,  
7 if taken, would constitute infringement of the '339 patent  
8 but deliberately avoided confirming that belief.

9 No reasonable jury could find that either of the  
10 Broetje parties contributed to the infringement by a third  
11 party of the asserted claims of the '339 patent.

12 AHG failed to prove that the Broetje parties  
13 sold, offered to sell, or imported within the U.S. a tube  
14 for use in the process that infringe an asserted claim of  
15 the '339 patent during the time the '339 patent was in force.

16 AHG presented no evidence that either of the  
17 Broetje parties knew that the tube was especially made to be  
18 used in a manner to infringe the '339 patent.

19 No reasonable jury could find that the Broetje  
20 parties willfully infringe the '216 patent or the '339  
21 patent.

22 AHG presented no evidence that either of the  
23 Broetje parties acted despite an objectively high likelihood  
24 that its actions would infringe a valid patent.

25 AHG presented no evidence that either of the

1 Broetje parties knew or should have known that its actions  
2 constituted an unjustifiably high risk of infringement of a  
3 valid patent. And,

4 Last, AHG is not entitled to patent damage. No  
5 damages based on the entire market value rule should be  
6 awarded.

7 AHG presented no evidence that customers  
8 demanded the Broetje cassettes or the rack and/or loading  
9 stations because of the tubes and/or cassette. There should  
10 be no recovery of AHG lost profits.

11 AHG failed to prove any of the Panduit factors.  
12 There is no evidence of entitlement to damages based on  
13 convoyed or derivative sales, and the expert report and  
14 report offered in support of the damages claim is unreliable  
15 and overstated.

16 That is my list, Your Honor. If you have any  
17 questions, I can obviously answer them.

18 THE COURT: Not at this time.

19 MR. KELLEHER: I understand, Your Honor.

20 THE COURT: I'm going to reserve judgment on  
21 the motion, but if plaintiffs wish to be heard they can be.

22 MR. LINDVALL: I probably think the only thing I  
23 can say is I think they pretty much preserved their rights.

24 THE COURT: I doubt that they missed anything.

25 MR. LINDVALL: It didn't sound like it. He may

Peters - direct

1 have but we will wait and see.

2 THE COURT: All right. We will take a break.

3 Thank you.

4 (Brief recess taken.)

5 \* \* \*

6 (Proceedings reconvened after recess.)

7 THE COURT: We'll bring the jury in.

8 (Jury returned.)

9 THE COURT: Welcome back.

10 Mr. Kelleher, what is next?

11 MR. KELLEHER: Your Honor, we'll call our next  
12 witness, Dr. Axel Peters.

13 THE COURT: Okay.

14 ... AXEL PETERS, having been first duly sworn,  
15 was examined and testified as follows ...

16 THE COURT: Good afternoon, and welcome,  
17 Dr. Peters.

18 And I'll just note for the record that our  
19 interpreter is nearby in case needed.

20 Mr. Kelleher.

21 MR. KELLEHER: (Indicating with binders.)

22 THE COURT: You may.

23 (Binders passed forward.)

24 DIRECT EXAMINATION

25 BY MR. KELLEHER:

Peters - direct

1 Q. Dr. Peters, could you please introduce yourself to  
2 the jury?

3 A. My name is Axel Peters, working for Broetje since  
4 2008.

5 Q. And what is your job title there?

6 A. I am COO, Vice President of Operations.

7 Q. Could you tell us about your education?

8 A. I'm a Ph.D. in Automation, and before I study  
9 mechanical engineering at the University of Aachen. It's  
10 one of the famous universities in Germany also.

11 Q. And before you worked at Broetje, where did you work?

12 A. I work for Kuka. Kuka is also a little bit famous  
13 for the car industry. So it's also automation company  
14 dealing with automation stuff for assembly lines and so on.

15 Q. That's K-u-k-a?

16 A. K-u-k-a. It's a robot manufacturer, like ABB. I  
17 don't know who is familiar with that.

18 Q. Dr. Peters, in your role as Chief Operating Officer,  
19 how familiar are you with Broetje's recordkeeping?

20 A. I am responsible for the CAD here, that is the  
21 drawing system, and also for our ERP system where we store  
22 our records for producing parts. Material handling is  
23 inside there. Production is inside there. What we have to  
24 do with the parts to do.

25 Q. That ERP system, that is a computerized system?

Peters - direct

1 A. That's an enterprise resource system that is dealing  
2 with the information that you have.

3 Q. Dr. Peters, in this case, have you been involved with  
4 trying to determine the exact number of rivet cassettes that  
5 Broetje has sold in the United States?

6 A. Yes, I have done that with my colleagues who prepared  
7 the data and got that out of the database.

8 Q. Could you please look at Exhibit No. DTX-1888?

9 A. What was the number?

10 Q. 1888.

11 A. (Witness complies.)

12 Q. Without discussing the contents of this, could you  
13 tell us briefly what is this?

14 A. Sorry. This is an overview we prepared to get the  
15 numbers of our cassettes.

16 Q. Okay.

17 A. That's an Excel sheet where we putting together all  
18 the data we got from the database.

19 Q. Where does the information come from?

20 A. From the ERP system. We selected it.

21 Q. How does information get put into the ERP system?

22 A. The information is typed in by people who work for  
23 us. For example, designers, if they design a new machine,  
24 they take in a BOM. That is a Bill Of Material, and then  
25 after which we know what it has to be in the machine.



Peters - direct

1 Q. Do the people who enter information into the system  
2 have knowledge of what it is they're entering?

3 A. Sure. We are even one expert who was directly  
4 dealing with all of the material that is in the machine, and  
5 he is also arranging it directly so we that know what is in  
6 the machine.

7 Q. Do they enter the information around the time the  
8 events that they are reporting occurs?

9 A. Yes.

10 Q. And is the information in the system kept in the  
11 ordinary course of business?

12 A. Yes, it is kept there.

13 Q. Is it the usual practice of Broetje to collect and  
14 maintain this information in your ERP system?

15 A. That's the usual, ya. Because even if you want to  
16 buy it with the supplier, you have to have it in the system.  
17 Otherwise, you can't buy it from the market.

18 MR. KELLEHER: Your Honor, I would offer into  
19 evidence DTX-1888.

20 MR. LINDVALL: No objection, Your Honor.

21 THE COURT: It's admitted.

22 (DTX-1888 is admitted into evidence.)

23 BY MR. KELLEHER:

24 Q. So this is going to be a little bit difficult for  
25 people to see, I know.

Peters - direct

1 A. I can't see anything here.

2 Q. But we can blow it up a little bit on the screen.

3 Just looking at the very top, there are a few rows,

4 Dr. Peters. Can you explain to us what it is that the

5 columns here mean?

6 A. Ya. What we've done, because we don't have a system

7 where we can see each cassette. We are not a cassette

8 seller, nor anything else. We just sell machines, and we

9 normally build this within projects, so we are project-based

10 company. So that is why we had to select the data from the

11 database and put it in an Excel sheet.

12 And on the opposite side, for example, then we

13 did a calculation what we thought might be the price, for

14 example, for the components, the cassettes, the rivet

15 filling station that we started work.

16 And then we got through each project, we knew

17 that was done in the U.S., took the order number. That is

18 the Auftrag in Germany. That is the second column you see

19 there. We took out the customer who bought it. For this

20 example, it was Vought in Dallas.

21 Then we looked into the bill of material of this

22 project and looked what we delivered for rivet cassettes,

23 loading station, and also the racks, put that together into

24 this document.

25 Q. So, Dr. Peters, that second column you just talked

Peters - direct

1 about it says Auftrag, A-u-f-t-r-a-g, that is the project?

2 A. That is the job number or the company for the  
3 project.

4 Q. Yes. So the number that is below that, it says  
5 315881?

6 A. Yes.

7 Q. Is that the project that we usually call project  
8 1588?

9 A. That is the project 1588 because the leading number  
10 is just to show that it's a project and the end number is  
11 just to, if you have more to do in a job, maybe the issues  
12 so you have additional numbers in the project.

13 Q. So is there a column that shows the quantity of  
14 fastener cassettes?

15 A. Yes. The second right column where it's in German,  
16 Gesamtmenge. Can you point?

17 Q. Yes.

18 A. That's the number of items in the row.

19 So the first you see there is, for example,  
20 is Niekassete 4.8-8, and there are 20, I think 25 -- I can't  
21 really read it -- about 25 in this project produced.

22 Q. Is there a place in this document where it shows the  
23 revenue for the project?

24 A. If you go further right, then we did the revenue  
25 project base because --

Peters - direct

1 Q. Technical difficulties.

2 A. Because we sell this as a part of the project, we  
3 took the revenue of the complete project and calculated it,  
4 and also for the component shown here for the rivet cassette  
5 for the rack and the loading station.

6 Q. So are we showing it now, Dr. Peters, the revenue?

7 A. No, it's still far to go on the right side. Yes,  
8 there is the ROS. That is the Return Of Sales. There a  
9 loss in this case in this project. And then we show it was  
10 the profit for the equipment within this project.

11 Q. Is that a negative sign there at the beginning?

12 A. That's a minus, yes. That is a negative sign. We  
13 don't do it in records in Germany. That is a minus we use  
14 there.

15 And we also show the sale price, the total sale  
16 price of the machine. That is the VK Gesamt.

17 To the left, that is the old price. That is the  
18 7 million Euro.

19 Q. This one here?

20 A. Yes, that is right. And for each equipment, we have  
21 for the rivets itself and also for the loading station and  
22 the filling station we have then the estimated sales price  
23 for the equipment.

24 Q. Does this document show the quantity of rivet  
25 cassettes delivered for all of the projects shown throughout

Peters - direct

1 the document?

2 A. Yes.

3 Q. I wanted to ask a question.

4 Can you go back a little to the left and show  
5 both this project, 1588, and the one below it, 1589.

6 There is a line here that says NBS AHG, and  
7 below it NAS AHG.

8 A. Yes. This was the first project to Vought Dallas  
9 where we first sold our own cassettes, and we still had an  
10 AHG rack and loading station included. That's why we  
11 pointed out, that's still an AHG system included.

12 Q. What does NAS mean?

13 A. (Witness speaking in German). That is the rack.

14 Q. And BAS?

15 A. That is (Witness speaking in German). A rivet  
16 loading station. That is the loading station.

17 Q. You showed earlier that the revenue received is shown  
18 here. Is any revenue shown here on this document for the  
19 AHG or F2C2 shown?

20 A. No, we didn't include it.

21 Q. Why not?

22 A. Because we didn't deliver -- we just delivered the  
23 accused product, it was an AHG original product.

24 Q. Dr. Peters, for some of the cassettes, there is a  
25 line that says r-u-n-d-s-c-h-l-a-u-c-h. Do you see that?

Peters - direct

1 A. It's rundschlauch. It is showing the round tubes we  
2 also used in cassettes.

3 Q. What do you mean by that, round tubes?

4 A. It's just the round shaped tube. It's not a  
5 pentagon-shaped tube. The round shape, we used it also, but  
6 we have reinforced fiber in so that it stays in the original  
7 position if we put it in the cassette.

8 Q. Dr. Peters, I am holding up DTX-1223D. Do you see  
9 this from there?

10 A. Yes.

11 Q. Can you tell what the shape of this tube is from  
12 where you are?

13 A. This is a round tube.

14 Q. How can you tell?

15 A. Because you see the fiber reinforcement there.

16 MR. KELLEHER: Your Honor, may I approach the  
17 witness?

18 THE COURT: You may.

19 BY MR. KELLEHER:

20 Q. Dr. Peters, I am handing you what has been marked  
21 DX-1353C. Can you tell me what this is?

22 A. This is one of the round tubes. You see here the  
23 fiber end. And it's also packed and colored. So we use it  
24 in the cassettes.

25 MR. KELLEHER: Your Honor, I move into evidence

Peters - direct

1 DTX-1553C.

2 MR. LINDVALL: No objection.

3 THE COURT: Admitted.

4 (Exhibit DTX-1553C received in evidence.)

5 BY MR. KELLEHER:

6 Q. Dr. Peters, we also saw a little bit to the left, we  
7 see something called a collaradaterpasette. Do you see  
8 that? What is that?

9 A. That is something special we use on the lower tube.  
10 It doesn't go in direct itself. It's used for collars,  
11 normally on the outside of the rivets. On the outside you  
12 put in a fastener and you put a collar from inside. We also  
13 store these circular cassettes. They don't go in direct.  
14 There we use the rectangular shape. They are near the  
15 tooling.

16 Q. And we you are talking about the tooling, are you  
17 speaking maybe at the top of the machine or --

18 A. Somewhere on the machine below on the upper tube  
19 where we rivet together. This is on the lower tube.

20 Q. What kind of machine tubes are used for the charges?

21 A. It is rectangular, rectangular, because this is a  
22 knot discolor. That is because you have this rectangular  
23 shape needed for the tube.

24 MR. KELLEHER: Your Honor, may I approach the  
25 witness again?

Peters - direct

1 THE COURT: You may.

2 BY MR. KELLEHER:

3 Q. Dr. Peters, I am showing you what is marked DTX-1553.

4 Can you tell us what this is?

5 A. Yes. This is one of our rectangular shapes. You  
6 see, that is really like a rectangle.

7 Q. Thank you very much.

8 MR. KELLEHER: Your Honor, I would move into  
9 evidence Exhibit DTX-1553D.

10 MR. LINDVALL: No objection.

11 THE COURT: It's admitted.

12 (Exhibit DTX-1553D received in evidence.)

13 BY MR. KELLEHER:

14 Q. Dr. Peters, could we go to the very bottom of this  
15 document. There is a green rectangle there. Could you tell  
16 us what this means?

17 A. This is the total number of cassettes that are in  
18 this sheet. We also pointed out how many are round shaped  
19 of them.

20 Q. So 871 total, and 330 round?

21 A. Yes.

22 Q. Now, the cassettes that we are talking about here, do  
23 these include cassettes that are sold as spare parts?

24 A. No. We have a separate slide for that.

25 MR. KELLEHER: Your Honor, the jury saw that



Peters - direct

1 earlier today with Mr. Benczkowski.

2 BY MR. KELLEHER:

3 Q. How reliable, Dr. Peters, can we believe this total  
4 is?

5 A. We did several versions because we had to. We found  
6 always some things, for example, we had shipping documents  
7 showing one test more than we believed we shipped. We had  
8 to look it up. At the end we found out we got some  
9 cassettes back from the former projects for the customer.  
10 We had to do some pretesting and after that we had to ship  
11 it back. There was one more in the data than in this sheet.

12 We discussed that eternally. But in the end,  
13 this exit sheet is based all on what we have built in our  
14 accounting. All the cassettes, and all the NAS system we  
15 have built in our company. In the project, what happened,  
16 the customer, he buys 16 cassettes, and then maybe he needs  
17 different rivets, he may also change the type of rivet  
18 cassettes he gets.

19 So that's always confusing. At the end you have  
20 to ask, did the program manager, for example, what he did in  
21 this program. In the end, this is all we get. And we have  
22 to order more cassettes than this from the company.

23 Q. The next exhibit in your book, Dr. Peters, DTX-1889.  
24 Can you tell us what this is?

25 A. I believe this is the projects we have done after

Peters - direct

1 2012 or '11.

2 MR. KELLEHER: Your Honor, with permission, I  
3 would move into evidence DTX-1889.

4 MR. LINDVALL: No objection, Your Honor.

5 THE COURT: It is admitted.

6 (Exhibit DTX-1889 received in evidence.)

7 BY MR. KELLEHER:

8 Q. We can blow it up now. Is this an update we did a  
9 few months ago?

10 A. Yes, we did, because the case went on and we updated  
11 this Excel sheet.

12 Q. Can we look at the very bottom. There is another  
13 green rectangle here?

14 A. This is an additional 215 cassettes with rectangular  
15 shape.

16 Q. In this case, there is no round tubes?

17 A. No.

18 Q. When you say pentagon-shaped tubes, what do you mean?

19 A. It's another line of pentagonal shape we used for  
20 these cassettes.

21 Q. Have you prepared a demonstrative slide to show what  
22 you mean by a pentagonal-shaped tube?

23 A. Yes, we have that.

24 Q. If we can just pull that up, Your Honor.

25 Dr. Peters, can you please explain what is shown

Peters - direct

1 in this demonstrative slide?

2 A. This is a typical situation we have where the tube,  
3 you see the rivet head, a rounded part, you see the rivet  
4 itself, the tube, and you see the space that is around the  
5 rivet, so that we have the outflow in the tube.

6 Q. How typical is this as an example of what a rivet  
7 looks like in one of Broetje's patented tubes?

8 A. This is the typical usage we have.

9 Q. How do you know that?

10 A. Because that's how we design it. We know that we  
11 need merely a millimeter space in the tube to get the  
12 airflow through that.

13 Q. Next, Dr. Peters, I would like to ask if you could  
14 please turn to DTX-1218. Could you tell us what this is?

15 A. This is a sheet for RLS calculation in the project.

16 Q. We saw in the large cell spreadsheet a column called  
17 ROS. What does ROS mean?

18 A. Return of sale.

19 Q. Is that a way to calculate profit?

20 A. It is always. It is comparable to the EBIT.

21 MR. KELLEHER: Can I move into evidence  
22 DTX-1218, Your Honor?

23 MR. LINDVALL: No objection.

24 THE COURT: It is admitted.

25 (Exhibit DTX-1218 received in evidence.)

Peters - direct

1 BY MR. KELLEHER:

2 Q. Looking at this first page, what is this?

3 A. This shows for the project, first what we have in  
4 there, we have Gewährleistung, that's the machine. It's an  
5 upgrade for the injector station. It's also Gewährleistung  
6 in there, it's the guarantee of the machine.

7 So there are different positions taken together  
8 under these project numbers. After that we have the  
9 budgetary side of the material, for example, of the design.  
10 We have the documentation, that's all compiled together in  
11 this document. And at the end -- there is also SG&H, sales,  
12 for example. At the end we see how much money we have gone  
13 with this complete project.

14 Q. I see 7,025,000 then a 3000?

15 A. This is our sales price for the total machine,  
16 7-million-and-2000-some small additions.

17 Q. Is that revenue?

18 A. That's not revenue -- revenue -- it's revenue.

19 Q. So if we could go to the left-hand side, if you  
20 could -- you don't need to read them aloud, but as you go  
21 down the right side here on these rows, what do each of  
22 these lines represent?

23 A. It shows the different things we did. If we are in a  
24 project, material, you can read it in English, material,  
25 then production, manufacturing, fertigung, then we have all

Peters - direct

1 the design, mechanical, electrical design we do in our  
2 machines.

3 Q. In English can we call these costs?

4 A. These are the costs in each department involved in  
5 our machines.

6 Q. Could we go down farther?

7 A. Also traveling costs, all included.

8 Q. Eventually, we get down to this red or purple line  
9 called ROS. Do you see that?

10 A. The yellow line, that is the revenue we had before,  
11 the 7 million, and then we have the total cost we had in  
12 this project, the red line is ROS, that is what we earn on  
13 this project.

14 Q. Did Broetje make money on this project, 1588?

15 A. Yes, we did.

16 I am sorry, we didn't, because, we have to go  
17 up, in the first line, that is the budgetary role. When we  
18 quoted it that's what we thought we would get for this  
19 project. The second one, Prognose, that's the forecast that  
20 the project manager says where we will be with the project  
21 at the end. Then we have in the third row HSK, that is then  
22 the real costs we had on this project.

23 Q. Dr. Peters, where in this document can I find the  
24 profit or loss that the company experiences from having sold  
25 the cassettes for this project?

Peters - cross

1 A. That's not really possible with our calculation  
2 because, for example, if we design for a cassette, we not  
3 just design the cassette because it's a rivet in the  
4 cassette. We also have to design tubes in the machine. We  
5 also may design the rivet exchanger, the tooling that is  
6 able to install this rivet in the machine. So we don't get  
7 a number for the cassette, because we are machining the  
8 cassettes.

9 Q. Be does that mean I won't able to find individual  
10 profit or loss amounts for components of the giant machine?

11 A. No. Material, for example, it is included in the  
12 design, it is also included in production.

13 Q. Is there any more reliable way a company can think of  
14 to calculate its profits or losses on its components?

15 A. We don't do that on components.

16 Q. Is this the most reliable way to calculate whether or  
17 not the company makes a profit or loss on projects?

18 A. Yes.

19 MR. KELLEHER: I don't have any more questions,  
20 Your Honor.

21 THE COURT: Okay. Cross-examination.

22 CROSS-EXAMINATION

23 BY MR. LINDVALL:

24 Q. Good afternoon, Dr. Peters.

25 You mentioned a thing called an ERP. Is that

Peters - cross

1 right?

2 A. Yes.

3 Q. What is ERP?

4 A. Enterprise Resource Plan, membership, I think,  
5 manufacturing, I think it's known.

6 Q. Have you ever heard of AMS?

7 A. AMS is American Manufacturing System.

8 Q. So AMS New York is the same?

9 A. AMS is the manufacturing system.

10 Q. I believe you testified that your ERP system and the  
11 AMS system are reliable?

12 A. Yes.

13 Q. I understand these systems are used by your outside  
14 auditors WHEN they audit you. Is that correct?

15 A. Yes, they are used from these guys and also there  
16 from the design department.

17 MR. LINDVALL: May I approach, Your Honor?

18 THE COURT: Yes, you may.

19 BY MR. LINDVALL:

20 Q. Let me show you what has been marked as DTX-1005. Do  
21 you recognize this?

22 A. Yes.

23 Q. Is this created through your AMS or ERP system?

24 A. That is created from USA side, yes.

25 Q. Is it created from your ERP system?

Peters - cross

1 A. Also from AMS system, yes.

2 Q. This is the type of data you expect to be reliable.

3 Correct?

4 A. Yes.

5 MR. LINDVALL: I move this into evidence,  
6 DTX-1005.

7 MR. KELLEHER: No objection.

8 THE COURT: It's admitted.

9 (Exhibit DTX-1005 received in evidence.)

10 BY MR. LINDVALL:

11 Q. If you look at the second page, DTX-1005, I want to  
12 look at the columns real quickly, if you look at Column F,  
13 that's the ship date. Correct?

14 A. Yes.

15 Q. Is that the shipment date?

16 A. Yes, I expect that.

17 MR. LINDVALL: I don't have any further  
18 questions, Your Honor.

19 THE COURT: Redirect?

20 MR. KELLEHER: Nothing further, Your Honor.

21 THE COURT: You may step down, Dr. Peters.

22 Thank you.

23 (Witness excused.)

24 THE COURT: You may call your next witness.

25 MR. KELLEHER: Your Honor, next we will call Dr.



Budach - direct

1 Steffen Budach.

2 ... STEFFEN BUDACH, having been first duly  
3 sworn, was examined and testified as follows ...

4 THE COURT: Good afternoon. And welcome to you,  
5 Dr. Budach.

6 I'll note for the record, the translator is  
7 nearby if you need her assistance.

8 THE WITNESS: Thank you.

9 (Documents passed forward.)

10 DIRECT EXAMINATION

11 BY MR. KELLEHER:

12 Q. Dr. Budach, could you please introduce yourself to the  
13 jury?

14 A. Yes. Hello. I'm Steffen Budach.

15 Q. For what company do you work?

16 A. I work for CLAAS.

17 Q. What is the relationship between CLAAS and the  
18 Broetje company?

19 A. Broetje used to be a subsidiary of CLAAS, the CLAAS  
20 company.

21 Q. When did that end?

22 A. Sorry?

23 Q. Until when? Until which year?

24 A. Between, between 2003 and 2011 or 12.

25 Q. What kind of business is CLAAS in primarily?

Budach - direct

1 A. CLAAS is a farm equipment manufacturer, like forage  
2 harvesters, combine harvesters or tractors, farm equipment  
3 for like cattle, mowing devices and so on.

4 Q. Who are CLAAS's main competitors?

5 A. The main competitors of CLAAS are all United States  
6 companies: John Deere, CNA, Case, New Holland, and Echo.  
7 Probably, you know Echo from Massey Ferguson, some company  
8 of the Echo group.

9 Q. Does CLAAS have any employees in the United States?

10 A. Yes. We have about 360 I believe in the United  
11 States.

12 Q. What is your current job with CLAAS?

13 A. I'm the head of the Patent Department.

14 Q. The Patent Department?

15 A. Yes.

16 Q. Since what year?

17 A. Since August 2001, I have the responsibility for the  
18 patent issue in the CLAAS group.

19 Q. Can you explain a bit more? What are your job  
20 responsibilities?

21 A. Okay. My most important thing is to, I work with a  
22 team. The most important thing is we have to monitor our  
23 patent publications from our competitors. That's the first  
24 one.

25 And the second one is that we give infringement

Budach - direct

1 opinions or noninfringement opinions to our R&D department  
2 worldwide. We have R&D departments in Europe and also in  
3 the United States. In Russia and India, for example.

4 Q. Why do you monitor the patent publications of your  
5 competitors?

6 A. Okay. What we expect is that competitors respect  
7 our patents, and the same applies for us. That we do not  
8 infringe any competitor patents. That's the most important  
9 thing for us, because it's very expensive to delete a  
10 product from the market if you get information years later  
11 that you infringe any third party's patents.

12 And that's why we have to. That's our main job.  
13 That's our main business, to monitor our products and the  
14 patent publications of our competitors to avoid patent  
15 infringement.

16 Q. Dr. Budach, could you tell us about your education?

17 A. Yes. Okay. I have studied agriculture engineering.  
18 I finished it with a doctorate degree in agriculture  
19 engineering. And subsequently, subsequently, I got a German  
20 patent lawyer degree.

21 Q. When you were studying to become a German patent  
22 lawyer --

23 A. Yes.

24 Q. -- will you tell us what types of law you studied?

25 A. Okay. To get the degree of a German patent lawyer,

Budach - direct

1 it's a completely separate study. In Germany, we have to  
2 study three years: two years of this in a law firm or in a  
3 Patent Department of an industrial company, and the first  
4 year in the German Patent and Trademark Office and in the  
5 German Federal Patent Court. It is a specific court which  
6 has to decide about relativity and irrelativity of patents,  
7 and at this time you work together with Judges in Germany.  
8 And altogether, we study about three years.

9 Q. During your studies, how is United States patent law  
10 treated?

11 A. Sorry?

12 Q. During your course of studies, does United States  
13 patent law ever come up?

14 A. Yes.

15 Q. Could you tell us how?

16 A. Okay. What we have to study is at first the German  
17 patent law, and then international patent law, and there we  
18 have to study European patent law and also United States  
19 patent law. At least, key figures of the United States  
20 patent law.

21 Q. What kind of test or tests do you have to take to  
22 become a German patent lawyer?

23 A. To become a German patent lawyer, you have to do  
24 two tests, one in written form and an oral test. The  
25 written test, you will have a five hour written test and

Budach - direct

1 five hour oral examination. And the oral examination is  
2 with five candidates and five hours in front of five Judges  
3 or Patent Examination Officers from the Patent and Trademark  
4 Office. And they can ask you any question they want and  
5 will also questions about the United States patent law.

6 Q. Dr. Budach, could you tell us, how well to you speak  
7 English?

8 A. I would say well enough to understand and to speak  
9 and to read English texts.

10 Q. What language did you and I use to speak to each other?

11 A. We, all the time we talk, we are talking in English.

12 Q. Why do you have an interpreter with you to help you  
13 testify?

14 A. I testify under oath, and I don't want to make any  
15 mistakes. That is why I would like to use from time to  
16 time, from question to question, an interpreter.

17 Q. When did you first start working at CLAAS?

18 A. I start working at CLAAS in 1997.

19 Q. And what was your first job?

20 A. My first job was as a patent engineer.

21 Q. What did you do as a patent engineer?

22 A. As a patent engineer, you have to monitor patent  
23 publications and you have to craft patent applications, but  
24 you are not entitled to represent a company at the court.  
25 That's just for German patent attorneys.

Budach - direct

1 Q. When the company is thinking about having new  
2 products, what kind of, what kind of patent policies are  
3 there for new products under development?

4 A. We have two policies. The first one is freedom to  
5 operate. That means the products that we launch should not  
6 be withdrawn from the market, any infringement issues.  
7 That's the first one.

8 And this process is done under our company in  
9 the so-called CLAAS product development process. That means  
10 we have, from time to time, to monitor our R&D projects,  
11 and we have to give opinions about infringement and  
12 noninfringement.

13 We have five milestones from the beginning of an  
14 R&D process until the end of the development projects. We  
15 have five stages where we have to look to the product, and  
16 we have to give an opinion that we do not infringe any  
17 patents of any competitors.

18 Q. What happens if during this process you have actually  
19 determined that a product would infringe someone's patent?

20 A. Well, at first we do -- we not allow, are not  
21 entitled to infringe any patents. If we find any disturbing  
22 patents, then we have to design-around these patents. That  
23 is the usual case.

24 Sometimes we also buy license agreements with  
25 third parties, if it's applicated. It depends on the order

Budach - direct

1 of the patents. But normally we have to design-around the  
2 patents.

3 Q. What do you mean by design-around?

4 A. Design-around means we have to respect patents, and  
5 we have to look for a lot for another solution. And the  
6 solution does not -- have not to infringe -- has not infringe  
7 these patents, what we have identified.

8 Q. Do you have anyone assisting you in your work?

9 A. Yes. In 2003, that is the primary talk about here, I  
10 have one patent engineer, and today I have one patent  
11 engineer and three German patent lawyers.

12 Q. How much experience do you have working with United  
13 States patents?

14 A. I would say we have, for the moment we have about  
15 300 filed or granted United States patents. Sometimes I  
16 personally draft patent applications for the U.S. in English,  
17 and we support our United States patent lawyers in drafting  
18 claims of the patent applications.

19 For example, if we are in the patent examination  
20 procedure, the examiners sometimes presents disturbing prior  
21 art, and then we have to amend the claims. And in most  
22 cases, it is our job to give support in amending the patent  
23 claims.

24 Q. How often do you deal with United States patents that  
25 are owned by CLAAS's competitors?

Budach - direct

1 A. I would say that is our daily business because we  
2 have to watch the patent issues worldwide, worldwide any  
3 patent issue.

4 Q. Dr. Budach, were you involved when the Broetje  
5 fastener cassette was being developed?

6 A. Yes.

7 Q. Could you tell us how you got involved?

8 A. Okay. I remember in the beginning of the 2000s,  
9 Broetje got more and more problems with the AHG cassettes.  
10 And I remember that in the middle of 2003, Broetje decided  
11 to develop its own cassette system. And in this time,  
12 Broetje did at first a patent search in their own company  
13 without our involvement, and some weeks or months later we  
14 were involved in this project. And that was my first  
15 contact, that Broetje came to us and ask for assistance in  
16 doing any patent searches worldwide to avoid any patent  
17 infringement. That was my first contact with this issue.

18 Q. Dr. Budach, could you please look at -- do you have  
19 an exhibit in your book, DTX-1594?

20 A. 1031?

21 Q. I'm sorry. 1594.

22 A. Okay. Yes.

23 Q. Could you tell us what this is?

24 A. That's a meeting report of an internal meeting within  
25 Broetje.



Budach - direct

1 MR. KELLEHER: Your Honor, assuming there is no  
2 objection, could I move into evidence DTX-1594.

3 MR. HOROWITZ: He assumes correctly. No  
4 objection.

5 THE COURT: It's admitted.

6 (DTX-1594 is admitted into evidence.)

7 BY MR. KELLEHER:

8 Q. So, Dr. Budach, now the exhibit is up on the screen  
9 so the jury can see it --

10 A. Okay.

11 Q. -- more easily. Could you tell us what was this  
12 meeting about?

13 A. This meeting about patent examination. You can see  
14 its regarding patent examination.

15 Q. And I see there is a list of patents, a review of  
16 patents.

17 A. Yes.

18 Q. Numbers.

19 A. Ya.

20 Q. Why were patents being looked at?

21 A. It's a lot of AHG patents, and one of them is the  
22 European part of the AHG patents we talk about here.

23 Q. The two United States patents?

24 A. Yeah, it's the two United States patents. Yes. I  
25 guess the EP 0 373 685.

Budach - direct

1 Q. Do you know what the result was of this meeting?

2 A. The result of that meeting was that Broetje decided  
3 to come to CLAAS, to the group Patent Department to ask for  
4 support in search prior art worldwide, to avoid any patent  
5 infringement.

6 Q. Could you please look at DTX-1168?

7 A. Yes.

8 Q. And what is this?

9 A. It's the European patent, the corresponding European  
10 patent to the United States AHG patents.

11 MR. KELLEHER: Your Honor, may I move into  
12 evidence DTX-1168?

13 MR. HOROWITZ: No objection, Your Honor.

14 THE COURT: It's admitted.

15 (DTX-1168 is admitted into evidence.)

16 BY MR. KELLEHER:

17 Q. So, Dr. Budach, this is the corresponding European  
18 patent that corresponds to the two United States patents  
19 owned by AHG in this lawsuit?

20 A. Yes.

21 Q. Could you tell me, does the European patent --

22 A. That's a European patent.

23 Q. Does it have claims like a United States patent does?

24 A. Based on the rules of the European, of European  
25 patents, that is necessary, to grant the European patents,

Budach - direct

1     they have been published in three languages, at least the  
2     claims.  Namely, in English, in German and in France --  
3     French.

4             So you can see here, the claims are written in  
5     English, in German, and in French.

6     Q.     Are you able to read these?  Are you able to read the  
7     English, German, and French claims?

8     A.     Sorry.  Okay.  Yes.  I can read English and French --  
9     English and German, but for French, if necessary, we use  
10    engineers for some.  But normally it's okay to understand  
11    English and German.

12    Q.     So after the meeting minutes that we looked at just a  
13    second ago, what happened next?

14    A.     I guess I had the personal meeting with Mr. Brinkies  
15    probably, yes.

16    Q.     Who is Mr. Brinkies?

17    A.     Mr. Brinkies -- at that time, Mr. Brinkies was a  
18    project manager of the new riveting system.

19    Q.     And could you look at DTX-1596?

20    A.     Yes.

21    Q.     Can you tell us what this is?

22    A.     It's the minutes of the meeting between Mr. Brinkies  
23    and me in October of 2003.

24             MR. KELLEHER:  Assuming no objection, may I move  
25    into evidence DTX-1596?

Budach - direct

1 MR. HOROWITZ: No objection, Your Honor.

2 THE COURT: It's admitted.

3 (DTX-1596 is admitted into evidence.)

4 BY MR. KELLEHER:

5 Q. So, Dr. Budach, we have an English language  
6 translation on the first page. If you need to refer to the  
7 German, it's farther back in the document.

8 A. Okay.

9 Q. Can you tell us what happened at this meeting?

10 A. It's the meeting about patent examination.

11 Q. Did you attend this meeting?

12 A. Yes, Mr. Brinkies and myself.

13 Q. What was the result of this meeting?

14 A. The result of the meeting was that we have different  
15 issues. The first one is that we have to monitor our own  
16 development. Probably, we have some inventive ideas we can  
17 protect by own patents. That was the one issue. And the  
18 other issue is that we have to research the prior art.

19 Q. And when you say research the prior art, what do you  
20 mean?

21 A. It means that we have to monitor or to use  
22 international patent databases to find any disturbing patent  
23 issues, for example.

24 Q. When you say "disturbing patents," what do you mean?

25 A. These are patents that we cannot -- that is not

Budach - direct

1 allowed to infringe these patents. Disturbing patents means  
2 if you use such an idea, we would infringe these patents.  
3 That means disturbing patents. Disturbing patents means we  
4 do not want to infringe these patents.

5 Q. Could we turn to the second page?

6 A. Okay. Yes.

7 Q. And I see there is an Item 3.0: Timeline. Do you  
8 see that?

9 A. Yes.

10 Q. What timeline is being set up here?

11 A. There is -- okay. Here is written what we have, what  
12 we have to do and what Broetje has to do that we can do this  
13 research. And under point one, you can read that all  
14 information from Broetje Automation must be with Dr. Budach  
15 by October 2003.

16 The first one is what we have to receive from  
17 Broetje to do this patent search, we talk about here.

18 And the next one is then an employee, in this  
19 case Mr. Volk, will undertake an examination of the patents  
20 directly with respect to F2C2 by the end of October.

21 Then the next step, that we have to do the  
22 patent search end of October 2003.

23 Q. So, Dr. Budach, why is F2C2 specifically being spoken  
24 about here?

25 A. Okay. That is our -- we use both languages, AHG or

Budach - direct

1 F2C2. That is one and the same. The patent holder is AHG  
2 but the company who manufactures the cassette of AHG is  
3 F2C2. That is why we use internal proposals alternately,  
4 AHG or F2C2.

5 Q. Why were AHG or F2C2's patents being discussed?

6 A. It was necessary to avoid any patent infringements.

7 Q. Could you please look at Exhibit 1597?

8 A. Yeah.

9 Q. Could you tell us what this is?

10 A. That's Mr. Volk's conclusion about the patent search.

11 MR. KELLEHER: Your Honor, assuming the patent  
12 search, may I offer 1597 into evidence?

13 MR. HOROWITZ: No objection.

14 THE COURT: It's admitted.

15 (DTX-1597 is admitted into evidence.)

16 BY MR. KELLEHER:

17 Q. Turn to the second page of this document.

18 A. Yes.

19 Q. What is shown here? On the top it says search TIZ.  
20 What is that?

21 A. In the first step we did a different patent search on  
22 international computer databases in the United States and  
23 European patent databases.

24 TIZ, it's a library, you could say it is a  
25 library where we have paper documents, with instructions to

Budach - direct

1 find anything that is prior art.

2 Q. Who prepared this document?

3 A. Mr. Volk prepared this document.

4 Q. What was the purpose of this report?

5 A. It is listed what countries we considered, in which  
6 technical fields we did the research, and what the result  
7 was.

8 Q. Were any United States patents searched for this?

9 A. You can read it in these countries, there is listed  
10 where we have researched, in DE, and also in the United  
11 States, and Japan, and France.

12 Q. Did Mr. Volk do any analysis on AHG patents?

13 A. Yes.

14 Q. For which countries?

15 A. As you can read, in Europe, France, all these  
16 countries that are listed here. And most of them are  
17 countries where AHG or F2C2 patents were avoided at that  
18 time to avoid any infringement of AHG patents. And you can  
19 read or see here, EP means European patents, FR is France,  
20 US is United States, GP is Japan, NCA is Canada. That's all  
21 these countries where AHG has patents.

22 Q. The list that is here later in this document, are any  
23 of the AHG patents involved in this lawsuit in Europe in  
24 this report?

25 A. In this report, we should probably talk about the

Budach - direct

1 international patent search. We did some other  
2 computer-based patent searches before we went to the patent  
3 documents in the building. That is why you cannot find in  
4 this document the AHG United States patents we talk about  
5 here.

6 Q. Did you actually do any analysis, personally, on  
7 AHG's patents?

8 A. Yes.

9 Q. For which countries?

10 A. For relevant countries, Europe means France, Germany,  
11 Japan, Canada and United States.

12 Q. Could you read the Japanese patents?

13 A. No, I cannot. But at that time it was of no interest  
14 because at that time we didn't sell machines to Japan.  
15 That's why we didn't consider the Japanese patents.

16 Q. Did you look at the United States patents?

17 A. Yes.

18 Q. What parts of the United States patents did you look  
19 at?

20 A. We started with the claims, that's what you have to  
21 consider, it's the same things that you have, at least at  
22 first to look into the claims. Second, you recognize what  
23 is claimed and what is the scope of the invention. The  
24 claims define infringement or noninfringement. And if you  
25 have looked into the claims, then you have to go to the



Budach - direct

1 description. To understand what is claimed in the claims,  
2 because each description of the patent, there is a  
3 dictionary for that patent, if you do not understand what's  
4 in it, the meaning of the claims, you have to look into the  
5 description to understand what is the technical  
6 functionality of the words used in the claims.

7 Q. When you looked at the claims of the United States  
8 patent, did you notice any differences between the U.S.  
9 claims and the claims in the European patent?

10 A. Okay. First one, in functionality, there are no  
11 differences. It is exactly the same patent. The United  
12 States patent, they use different ways for passageways and  
13 grooves. In Europe we use grooves. In HP we use grooves.

14 Q. How did you evaluate the meaning of groove and  
15 passageway in the United States patents?

16 A. We start with the description of the United States  
17 AHG patents. They interchangeably use the word groove or  
18 passageway for one and the same thing. Namely, probably,  
19 later on, we can come to this subject, with the United  
20 States patents, the word groove and passage are used  
21 interchangeably. That was the first one.

22 The second one is, we looked into the  
23 description of the European and the United States patent.  
24 And in both cases, we have the same technical description,  
25 what does it mean, groove or passageway. That was our first

Budach - direct

1 conclusion, that passageway and groove had no difference in  
2 the technical functionality.

3 Q. Did you also look at the prosecution histories of  
4 United States patents?

5 A. Yes.

6 Q. Why did you do that?

7 A. It's the usual thing, what we do at all times, in  
8 other cases, to understand what the United States patent  
9 examination officer understands the claims. That's  
10 important for us, to understand what is relevant in the  
11 prior art to understand what's claimed in the claims.  
12 That's why regularly we looked at the file histories of the  
13 U.S. patents.

14 Q. How did you use the prior art that had been cited in  
15 the prosecution histories of the United States patents?

16 A. We looked in this prior art to understand what the  
17 meaning of groove and passageway in the eyes of the United  
18 States patent examiner that was involved for us to  
19 understand what is the meaning of the examiner, thinking  
20 about passageway and groove.

21 Q. Can you please look at DTX-1180.

22 A. Yes.

23 Q. Dr. Budach, do you recognize what this is?

24 A. Yes. That is one of the prior art patent documents,  
25 what is recognized in the United States as an examination

Budach - direct

1 procedure.

2 Q. This is one of the patents cited during the  
3 prosecution of the United States patents?

4 A. Yes.

5 MR. KELLEHER: Your Honor, I would move into  
6 evidence DTX-1108.

7 MR. CAHR: No objection, Your Honor.

8 THE COURT: It is admitted.

9 (Exhibit DTX-1108 received in evidence.)

10 BY MR. KELLEHER:

11 Q. This appears to be a patent to a Mr. G.E. Byassee?

12 A. Yes.

13 Q. For what did you use this patent?

14 A. To understand what does groove mean.

15 Q. What did it lead you to believe improve means?

16 A. Yes. You can see it on Figure 4, Exhibit No. 4, No.  
17 35, the examiner, that is the groove product line in the  
18 patent application that was described. Namely, that it is a  
19 groove which opened into a space. However, the space is  
20 exactly configured.

21 Q. Next, Dr. Budach, could you please look at DTX-1193?

22 A. Yes. That is prior art, what the examiner recognized  
23 or considered.

24 MR. KELLEHER: Your Honor, I would move into  
25 evidence DTX-1193.

Budach - direct

1 MR. CAHR: No objection.

2 THE COURT: It is admitted.

3 (Exhibit DTX-1193 received in evidence.)

4 BY MR. KELLEHER:

5 Q. Dr. Budach, this appears to be a patent to a Mr. or  
6 Ms. Horstmann. Is that right?

7 A. Yes.

8 Q. For what did you use this patent?

9 A. That is also to understand what does it mean,  
10 passageway or groove.

11 Q. What did it teach you?

12 A. You can see that there is Figure No. 9, 1b, 1b is in  
13 more detail. And the corners, here is No. 9, it is  
14 understood as grooves or passageways as claimed in the AHG  
15 United States patent.

16 Based on this prior art, the examiner rejected  
17 the United States patent application two times, because it  
18 was, his meaning, they are disclosed passageways in the  
19 meaning of the United States patents.

20 Q. Dr. Budach, could you also look at DTX-1031, please?

21 A. Yes.

22 Q. Is this something else that you also looked at?

23 A. Yes.

24 MR. KELLEHER: Your Honor, I would move into  
25 evidence DTX-1031.

Budach - direct

1 MR. CAHR: No objection.

2 THE COURT: It's admitted.

3 (Exhibit DTX-1031 received in evidence.)

4 BY MR. KELLEHER:

5 Q. Dr. Budach, what is this?

6 A. That is also prior art. And this prior art is  
7 considered in the description of the AHG United States  
8 patents and in the entire patent family of AHG. It is the  
9 closest prior art, in patent cases, one would say here it's  
10 the closest prior art. It's the next prior art.

11 And this patent, this documents has been  
12 considered during the examination procedure of the AHG  
13 patents.

14 Q. So to be sure we understood you, this is a patent  
15 application from England?

16 A. Sorry?

17 Q. Is this a patent application from England?

18 A. Yes, that's U.K. patent application. There is also a  
19 German parallel document.

20 Q. Among the inventors named are Shinjo and a Komaki.  
21 Is that right?

22 A. Yes. Shinjo and Komaki.

23 Q. If I use the word Shinjo or Komaki, it will be okay  
24 if I am referring to this?

25 A. Okay.

Budach - direct

1 Q. What did looking at this document cause you to  
2 believe groove or passageway meant?

3 A. Okay. Probably, we should start with Figure 2.

4 Q. What is shown in Figure 2?

5 A. Figure 2 -- sorry, Figure 1, just for your  
6 understanding, Figure 1 shows the cassette, which is coiled,  
7 and inside the cassette there will be transported or  
8 delivered knots instead of rivets. They are knots inside  
9 the tubes.

10 If you go to Figure 2, that is a detail, it is a  
11 cross-section detail of the tube. And what you can see is,  
12 with 2a, 2a is the inner space of the tube. There we have  
13 four tubes side by side. And 2a is the inner space of the  
14 tube. And No. 8 is a nut. In this case, in our cases, we  
15 would talk about fasteners.

16 What you can see is the input is situated inside  
17 the space 2a. And in the description of this patent, you  
18 can read, it says, in the space 2a is compressed air  
19 filtered or delivered, that each nut gets in contact with  
20 the compressed air, each nut, to avoid any junk.

21 That is the same motivation or the same problem  
22 as solved by the AHG patent. And the examiner said this  
23 patent does not disturb the granting of the AHG patent.

24 That would mean that what we see here --

25 Q. Is this the text you were referring to?

Budach - direct

1 A. Okay. There you can read it. The channels 2A are  
2 dimensioned so that there is sufficient space for compressed  
3 air to exert a force on the individual nut 8, thereby  
4 ensuring a smooth movement towards the other end 5 of the  
5 tube 2.

6 Q. What does that text help you understand?

7 A. Yes. They are exactly the same, describing what AHG  
8 patents want to get protected. Namely, that you have enough  
9 space inside the tube to deliver rivets or in this case  
10 nuts, and also the compressed air.

11 And, if that's important, there we have corners,  
12 in Figure 2, in the cross-section of Figure 2 you can see  
13 corners, but this is a rectangular cross-section.

14 Similarly, the examiner came to the conclusion  
15 that it does not disturb the teaching of the AHG patent.

16 Q. Did you come to an understanding about how the claims  
17 of these patents relate to corners of what I will call a  
18 polygon, in this case a rectangle?

19 A. In the patents, in the AHG United States patent, we  
20 can read in the claims, passageways or grooves have to open  
21 in two or open out to a space or a channel. Here we have  
22 just the channel without any further grooves or passageways  
23 to open this. There we have just a space, and the space is  
24 large enough to deliver the nuts or for compressed air as  
25 well.

Budach - direct

1                   So we do not need, instead of the AHG patent, we  
2 do not need any grooves to deliver compressed air.

3       Q.       Did there come a time where you communicated your  
4 understanding and opinion about the AHG patents to the  
5 people at Broetje?

6       A.       Could you repeat the question?

7       Q.       At some point in time, did you communicate your  
8 opinion --

9       A.       Yes.

10      Q.       -- to the people at Broetje?

11      A.       Yes.

12      Q.       Why don't we look at Exhibit 1598.

13                   Your Honor, there is a better exhibit number for  
14 that. It's JTX-61 at the front of the book. This document  
15 is already in evidence.

16      A.       Okay.

17      Q.       Dr. Budach, do you recognize this document?

18      A.       Yes. I recognize this document.

19      Q.       What is it?

20      A.       That's a lot of nomenclature for a manufacturing  
21 advertisement.

22      Q.       Why don't we look at the third page of this. Dr.  
23 Budach, what is this, the circle in the middle?

24      A.       It is a cross-section of the tube, just manufactured  
25 by Teichmann.



Budach - direct

1 Q. Teichmann is the outside tube manufacturer?

2 A. Is the outside tube manufacturer.

3 Q. What did you do when you found out that Broetje had  
4 made an inquiry to a tube manufacturer about this tube?

5 A. My understanding was that if we wanted to use such a  
6 cross-section, that would be patent infringement of the AHG  
7 United States patent. And I gave the order that we have to  
8 change this cross-section.

9 Q. Why don't we look at DTX-1599.

10 A. Yes.

11 MR. KELLEHER: This exhibit is already in  
12 evidence as well, Your Honor.

13 BY MR. BUDACH:

14 Q. Dr. Budach, do you recognize this document?

15 A. Yes.

16 Q. Could you tell us what it is?

17 A. We have different cover sheets.

18 1598. 99. Sorry. Okay. Yes.

19 Q. So what is this document?

20 A. Okay. It's the second order from Broetje to  
21 Teichmann. It's the manufacturer of the tubes.

22 Q. So let's look at the second page.

23 A. Okay. And probably one has to look into the text  
24 which contrary to our first intention. We want to use not  
25 with longitudinal grooves but in the pentagonal shape.

Budach - direct

1           And in the second page, you can see that is a  
2           changed cross-section of the tube which Broetje asked for,  
3           and what you can see is that we here have a smooth pentagon  
4           shape cross-section of the tube.

5           Q.       So whose idea was this tube shape?

6           A.       That's based on my -- sorry. That is based on my  
7           opinion about what does it mean, grooves or passageways in  
8           the AHG patents and to avoid any infringements.

9           Q.       What did Broetje do after you gave this opinion to  
10          them that if they used a circle tube with the five grooves  
11          that it might infringe? What did they do?

12          A.       Okay. So they follow my opinion and change the  
13          cross-section structure, as you can see here, and that all  
14          of the grooves are in a pentagon shape.

15          Q.       Now, after this, did you have -- let me ask the  
16          question this way. Could you please look at Exhibit 1602?

17          A.       Okay.

18          Q.       Could you tell us what this is?

19          A.       Yes. That's our statements about our patent search  
20          that we done in October/November 2003.

21                   MR. KELLEHER: Your Honor, could I move into  
22          evidence DTX-1602.

23                   THE COURT: Is there any objection?

24                   MR. HOROWITZ: No objection, Your Honor.

25                   THE COURT: It's admitted.

Budach - direct

1 (DTX-1602 is admitted into evidence.)

2 MR. KELLEHER: Thank you, Your Honor.

3 BY MR. KELLEHER:

4 Q. So, Dr. Budach, can you tell us what this is?

5 A. Yes. That's our letter to Mr. Brinkies, and we talk  
6 about the results of the different patent searches and what  
7 we have to do to avoid any patent infringements. And in  
8 the first chapter, we talk about AHG cassettes and the  
9 relevant AHG patents which we have to consider to avoid any  
10 patent infringements.

11 Q. And for which countries was this advice being given?  
12 Which countries' patents?

13 A. That's based on Mr. Fritz patent search, which we saw  
14 some minutes ago that is considered, it's a worldwide patent  
15 search and all the relevant countries of the AHG patents.

16 Q. So at the time, you sent this letter to Mr. Brinkies  
17 in December of 2003?

18 A. Yes.

19 Q. What was your understanding of the shape of the tube  
20 that Broetje was going to use for their cassette?

21 A. My understanding was that we could use a smooth  
22 pentagon shape tube, where we have enough space to deliver  
23 compressed air from rivet to rivet without, without to have  
24 grooves or passageways punched into the wall from the tube,  
25 for example.

Budach - direct

1 Q. So, Dr. Budach, why don't we look at DTX-1604.

2 A. Yes.

3 Q. What is this?

4 A. That is the further review. It's a letter from  
5 Broetje to me --

6 Q. And what --

7 A. -- to look again to the cross-section of the tubes  
8 which was used by Broetje.

9 MR. KELLEHER: Your Honor, I would move into  
10 evidence DTX-1604.

11 MR. HOROWITZ: No objection.

12 THE COURT: It is admitted.

13 (DTX-1604 is admitted into evidence.)

14 BY MR. KELLEHER:

15 Q. So, Dr. Budach, can you tell us again, I'm sorry,  
16 what is this?

17 A. Ya. Okay. That's a question for Mr. Hoffmann.  
18 Mr. Hoffmann was the designer of the Broetje rivet cassette.  
19 He asked me again that I have to give an opinion about the  
20 different cross-sections shown on the upper end of the  
21 slides, whether to avoid any patent infringements of the AHG  
22 patents.

23 And you can see on the left that this, the F2C2  
24 profile from 2005, and in the middle, that is the smooth  
25 pentagon shape profile from Broetje, and Sketch No. 3 is

Budach - direct

1 just a further profile from Broetje, could we use that or we  
2 couldn't use it.

3 And I confirmed again that we could use the  
4 smooth shape, pentagon shape cross-sectional tube as a  
5 smooth, pentagon shape cross-section.

6 Q. Why don't we look at DTX-1605?

7 A. Yes.

8 Q. Can you tell us what this is?

9 A. It's an e-mail from Mr. Harstorff, the former CEO of  
10 Broetje, to me.

11 Q. Is it --

12 A. I'm sorry. Okay. That's my answer. That's my  
13 answer. To Mr. Harstorff.

14 MR. KELLEHER: Your Honor, could I move into  
15 evidence DTX-1605?

16 MR. HOROWITZ: No objection.

17 THE COURT: It's admitted.

18 (DTX-1605 is admitted into evidence.)

19 BY MR. KELLEHER:

20 Q. So, Dr. Budach, this was your response e-mail?

21 A. Yes.

22 Q. Okay. So for which countries' patents are you  
23 responding?

24 A. It's for the United States, Japan, and Canada.

25 Q. And also Europe?

Budach - direct

1 A. It's European.

2 Q. And what do you tell the people at Broetje?

3 A. That we can use -- the conclusion is that we can use  
4 a smooth five pentagon-shape cross-section for our tubes in  
5 the rivet cassettes.

6 Q. Now, Dr. Budach, have you prepared a demonstrative  
7 slide to help explain --

8 A. Yes.

9 Q. -- what your opinion was that you had in your mind  
10 that you communicated to Broetje?

11 A. Yes. I would like to show it to give you better  
12 understanding for my thinking what is my understanding from  
13 groove and passageway.

14 Q. Could you please explain this?

15 A. Yes. Could I use a laser pointer?

16 MR. KELLEHER: May I approach, Your Honor?

17 THE COURT: You may.

18 (Laser pointer passed forward.)

19 BY THE WITNESS:

20 A. Okay. What you see here, you have three figures. On  
21 the left, you can see the Shinjo reference mentioned ten  
22 minutes before.

23 What you can see here, that this is enough.  
24 That is the cross-section of the tube in the Shinjo  
25 reference.

Budach - direct

1           Inside the Shinjo reference, there are yellow  
2           colors. That is space, and inside the space is situated the  
3           nut, blue color. And you have a huge number of nuts inside  
4           this tube.

5           And here, you can deliver the tube -- the nuts  
6           and the compressed air as well as in the yellow space. In  
7           this solution, you do not need any grooves to deliver  
8           compressed air to each nut or fastener in this case.

9           In the middle, we have the AHG United States  
10          patents. And what you can see here, the outside is the  
11          cross-section of the tube, and the blue one here is the head  
12          of the rivet inside of the tube. And you see that the tube  
13          corresponds with the inner diameter -- outer diameter of the  
14          tube correspond with the inner diameter of the tube. And  
15          you have no space to deliver compressed air from one rivet  
16          to the next, and that's why the AHG patent suggested to use  
17          passageways or grooves -- see the yellow color? -- to  
18          deliver or transport compressed air to each rivet.

19          And on the right-hand side, that's Broetje  
20          solution. See how you have the tube? Inside the tube is a  
21          smooth pentagon-shaped cross-section, yellow color, and the  
22          blue one is the head of the rivet. And what you can see,  
23          that you have a huge space between the rivet head and the  
24          inner surface of the tube to deliver compressed air.

25          So that's now my conclusion or my understanding

Budach - direct

1 from what does it mean, passageway or groove. If you have  
2 such a solution, you have no space. You need --

3 MR. HOROWITZ: Your Honor, forgive me. I  
4 apologize, Dr. Budach, but it calls for a narrative  
5 objection.

6 THE COURT: Sustained.

7 BY MR. KELLEHER:

8 Q. So, Dr. Budach, you have an arrow going from the  
9 right-hand tube to the middle tube saying no infringement.  
10 What does that mean?

11 A. Okay. I have not finished my explanation. Okay?  
12 It's just my understanding. It's not an interpretation of  
13 the claims. It's my understanding what does it mean.

14 Our solution, Broetje solution would be the same  
15 like this one. We have enough space to deliver compressed  
16 air (indicating), and we have the rivet as well in one and  
17 the same channel.

18 The question, I didn't make my argumentation. I  
19 have to start again.

20 THE COURT: I think you had better ask him a  
21 question.

22 MR. KELLEHER: I think so, Your Honor.

23 BY MR. KELLEHER:

24 Q. Dr. Budach, there is an arrow going from the  
25 right-hand tube to the Shinjo rectangular tube that says



Budach - direct

1       invalidity. What does that mean?

2       A.       Could I show it? It is a little bit easier. Is it  
3       okay?

4               (Continuing through translator): I'm going to  
5       briefly explain myself in German.

6               What I said already before in English is that  
7       what you see on the left is the actual Broetje solution  
8       which we have nowadays. In the middle, you see the solution  
9       according to AHG.

10      BY MR. KELLEHER:

11      Q.       And what is on the left?

12      A.       On the left, we have the Shinjo.

13              (Through translator): And on the left you have  
14      the Shinjo example. And Shinjo is cited within the AHG  
15      patent in the U.S.

16      BY MR. KELLEHER:

17      Q.       Dr. Budach, what is the significance of the yellow  
18      colored portions of the three tubes?

19      A.       (Through translator): What you see in yellow is the  
20      Broetje solution, on the right is the space.

21              THE COURT: Mr. Kelleher, I am afraid we reached  
22      the end of the time with our jury today. So we have to  
23      finish this up in the morning.

24              MR. KELLEHER: I understand.

25              THE COURT: Bear with me a minute, Dr. Budach.

1           Ladies and gentlemen of the jury, a couple  
2 things before we let you go tonight. Tomorrow is going to  
3 be a little bit different than the other days.

4           First off, we're not going to start until 9:30.  
5 I have had another matter come up that I have to deal with  
6 first thing in the morning, so if you could be here in time  
7 to order lunch and start at 9:30, that will be fine.

8           Rest assured we are on track. I know sometimes  
9 it may seem like we're not but we are where we expected to  
10 be at this point in the trial. So don't worry about that.

11           Beyond that, I guess I will just say no talking  
12 about the case, no research or anything like that. We'll  
13 look for you tomorrow. Have a good evening.

14           (The jurors respond, "thank you.")

15           (Jury left courtroom.)

16           THE COURT: Dr. Budach, you are free to step  
17 down.

18           I want to talk about a couple things. Then  
19 we'll take a short break and we'll come back and argue about  
20 the jury instructions and the verdict sheet. So if anyone  
21 wants to go or needs to go feel, free to do so.

22           So I may be available to see all of you at 8:30  
23 tomorrow. Basically, I have a criminal trial scheduled to  
24 start Monday and I need to have a proceeding related to that  
25 tomorrow morning. It will start whenever everybody gets

1 here, which could be 8:30, it could be 8:45, could be 9:00.  
2 It shouldn't take more than a half hour. So be available to  
3 me at 8:30 but I may need to put you off depending on how  
4 the criminal proceeding is going.

5 I don't have the actual time, but my sense is  
6 we probably have about five and-a-half hours total left for  
7 both sides, something on that order. Give me a sense as to  
8 how you expect to use that time and when you think you would  
9 ideally like to be doing closings.

10 First, Mr. Kelleher since I guess --

11 MR. LINDVALL: He beat me up.

12 THE COURT: It's still his case so we will start  
13 with him.

14 MR. KELLEHER: We are almost done with  
15 Dr. Budach, Your Honor. After that, we have our two expert  
16 witnesses to put on, and then I guess we have a few more  
17 videos as well to show. Then we will rest our case-in-chief.

18 THE COURT: What is your rough estimation as to  
19 how long you want to save for closing?

20 MR. KELLEHER: I would like to save an hour for  
21 closing.

22 THE COURT: But certainly not more than an hour  
23 is your anticipation.

24 MR. KELLEHER: Yes, Your Honor.

25 THE COURT: Similar question. Mr. Lindvall, how

1 does it look to you?

2 MR. LINDVALL: We would have obviously  
3 cross-examinations of the two witnesses. Then we would put  
4 on a small rebuttal case for the invalidity, maybe a little  
5 bit on noninfringement with our expert Dr. Kytomaa. And for  
6 closing, probably an hour and 15 minutes, with 15 minutes  
7 on the rebuttal. That is what I'm looking at.

8 THE COURT: Okay. And my guess is that the  
9 instructions are probably a good hour is my guess.

10 With the criminal matter coming up, I don't  
11 know if it's going to be possible to get through all of  
12 the evidence, all of the closings and my reading of the  
13 instructions tomorrow. It may be possible.

14 Do either of you have a strong view as to  
15 whether we should be trying to fit that all in or if you  
16 want to just aim for closing on Friday morning?

17 MR. LINDVALL: I would love to aim for closings  
18 on Friday morning, if possible.

19 THE COURT: How do you feel about that,  
20 Mr. Kelleher?

21 MR. KELLEHER: I strongly concur.

22 THE COURT: Strongly concur. Should I push my  
23 luck and see what else you can agree to?

24 All right. Well, I know I had scheduled another  
25 matter for Friday morning. Let me take a quick look at

1 whether I can maybe move that, and I have to collect my  
2 notes on the jury instructions. So we'll take a recess for  
3 ten minutes, and I will come back and give you guidance on  
4 all that.

5 (The attorneys respond, "Thank You, Your  
6 Honor.")

7 (Brief recess taken.)

8 \* \* \*

9 (Proceedings reconvened after recess.)

10 THE COURT: So we will let you do the closings  
11 on Friday. It's possible, unlikely, but possible we will  
12 start at 9:30. I am trying to move things around. I don't  
13 want to start you any later than that, so we can get things  
14 to the jury by lunchtime. But I will let you know that  
15 tomorrow whether we are starting late on Friday or not.

16 Here is how I want to proceed with the argument  
17 on jury instructions and on the verdict form.

18 You all narrowed things down. I greatly  
19 appreciate that. I have maybe a dozen or so that I need a  
20 little bit of feedback on. I think it will work best, you  
21 can probably, as long as you speak loudly enough for me to  
22 hear and the court reporters, just to stay at counsel table  
23 and I will just bounce back and forth between you. Then  
24 after we go through what's on my list, I will ask you if you  
25 have got any others that you want to be heard on and give

1       you a chance to do that.

2               We will start with the jury instructions. My  
3       first question is at 6.8, I am working from the version that  
4       was filed yesterday, the most recent version. Obviousness -  
5       Level of Ordinary Skill. My question there is, does Broetje  
6       have a proposal as to what one of ordinary skill is and  
7       should I tell the jury that?

8               MR. KELLEHER: Our only proposal, Your Honor, is  
9       that it's someone who is capable of combining references in  
10      the case. We don't have an education listing for such a  
11      person.

12              THE COURT: Okay. I guess the question to AHG  
13      is, although that seems a little bit unusual, if I am going  
14      to tell the jury what your view is as to what one of  
15      ordinary skill is, shouldn't I tell the jury what the  
16      defendant's view is as well?

17              MR. LINDVALL: Well, my only comment is, I don't  
18      think defendants' view of what one of skill in the art is is  
19      a proper description because it doesn't cover the law of who  
20      one of ordinary skill is.

21              THE COURT: Your proposal is I tell the jury  
22      what your proposal is but don't even tell the jury what  
23      their proposal is?

24              MR. LINDVALL: Your Honor, they don't disclose  
25      one in the experts reports. That's why they don't have one

1 . We shouldn't be penalized by them having some ambiguous  
2 one by saying a person who knows all about the prior art.  
3 That is really so ambiguous that it would lead the jury  
4 astray. They need something just like the law would say it,  
5 someone who is defined, who is that person, the educational  
6 background and professional background. We have done that.

7 I think what we should do is use AHG's, because  
8 they haven't given a proper one.

9 THE COURT: Would you object to me telling the  
10 jury Broetje doesn't have a similar proposal or hasn't  
11 identified a person of any particular --

12 MR. LINDVALL: I don't have a problem with that.

13 THE COURT: Mr. Kelleher, do you object to that?

14 MR. KELLEHER: I think conceptually we could  
15 work out language to that effect, Your Honor. Broetje does  
16 not propose any particular education level as being  
17 necessary for a person to be a person of ordinary skill.

18 THE COURT: All right. That sounds better to me  
19 than what you had in here.

20 Mr. Lindvall, would you object to something  
21 along those lines? Broetje does not propose any particular  
22 education level for one of ordinary skill in the art.

23 MR. LINDVALL: The only thing I would object to,  
24 Your Honor, they have never given that opinion. That is the  
25 first time we have heard it.

1 THE COURT: They have never given you  
2 affirmatively any definition.

3 MR. LINDVALL: That's correct, Your Honor. So  
4 they are basically saying, one skilled in the art doesn't  
5 need any education or any work experience.

6 THE COURT: Is that a new position to you?

7 MR. LINDVALL: I don't know if that's their  
8 position.

9 THE COURT: If that is their position is that  
10 news to you? Is that new? Or has that been their position  
11 all along?

12 MR. LINDVALL: That is new, Your Honor. They  
13 never gave an opinion.

14 THE COURT: Mr. Kelleher, is that new?

15 MR. KELLEHER: I don't think so, Your Honor.  
16 When we were here in January we discussed this impact issue  
17 about the Graham factors and the issue of what exactly the  
18 level of ordinary skill is that would allow Mr. POSITA to  
19 jump that gap of the claimed invention in the prior art.  
20 The question is what is the skill set of such a person. Not  
21 how many years did this person go to school. Our position  
22 is, however you define whoever a person of ordinary skill  
23 is, they have the ability to drop a rivet into the Shinjo  
24 reference. Certainly, the definition they have come up  
25 with, that skill set, I think the skill level is relatively



1 low and we need to define it that way. It is not a very  
2 difficult thing to imagine people's skill set.

3 THE COURT: We will give that more thought.  
4 Thank you very much.

5 Next is 8.0, Unfair Competition. It is a joint  
6 instruction. Unless I missed it, this is the only place  
7 where you would have tell the jury about the Lanham Act and  
8 Section 43(a).

9 As I understand it from I guess looking at the  
10 verdict sheet and sort of the totality, I think the parties  
11 are in agreement that liability, if any, on state unfair  
12 competition and federal unfair competition has to come out  
13 the same way and has to come out the same way as trade dress  
14 infringement. Is that the parties' positions?

15 MR. CAHR: Yes, Your Honor. I believe we are in  
16 agreement on that.

17 MR. LINDVALL: We are in agreement on that, Your  
18 Honor.

19 THE COURT: I am glad we are in agreement on  
20 that. I don't want to unnecessarily confuse or worry the  
21 jury.

22 It seems to me, if I am going to reference any  
23 of that at all, I should simply tell them, the parties agree  
24 that the outcome on state and federal unfair competition  
25 should be the same as your outcome on trade dress

1       infringement.

2                   MR. CAHR: Absolutely, Your Honor. We would be  
3       in agreement with that.

4                   THE COURT: Do plaintiffs disagree with that?

5                   MR. LINDVALL: No problem on that instruction,  
6       Your Honor, depending on how we do the verdict form.

7                   THE COURT: Right. There are implications on  
8       how we do the verdict form. If I am going to say anything  
9       about unfair competition, I think I should say in substance  
10      what I have just outlined.

11                   Do I need to mention the unfair competition  
12      claims to them? Is there a reason to instruct the jury on  
13      it and then get a verdict from them on it?

14                   MR. LINDVALL: That's a good question. I can  
15      understand what you are proposing. If they find a violation  
16      of the Lanham Act, then automatically they would have the  
17      unfair competition, federal and state unfair competition.

18                   THE COURT: That seems what you all have agreed.  
19      What I am not sure is whether you think the damages analysis  
20      may be different, and therefore you want the jury to go  
21      through the mental exercise, I guess, of deciding whether  
22      they accept the parties' agreement after the trade dress  
23      decision, whether to further analyze.

24                   MR. LINDVALL: I think the only difference, at  
25      least under the state unfair competition, there is punitive

1 damages. And there is not under the Lanham Act.

2 I am not sure if -- what you are saying is if  
3 they find Lanham Act and then they find the other ones  
4 automatically, it should go to punitive damages. I think  
5 that would still be fine.

6 THE COURT: What do the defendants think?

7 MR. CAHR: I think that's okay, Your Honor.  
8 Since it probably doesn't have to be dealt with in the  
9 instruction but reflected on the verdict form, I think  
10 that's probably all right.

11 THE COURT: So where would that --

12 MR. CAHR: Maybe I misunderstood you. Say that  
13 one more time?

14 MR. LINDVALL: If you are going to -- the way  
15 the Court is proposing, we will instruct the jury, if you  
16 find Lanham Act, you will find unfair state and federal  
17 competition. And will there be separate jury questions,  
18 though? Because that can cause -- you can imagine what  
19 would happen there, could happen there.

20 If you instruct it there, you probably need some  
21 way to force them to find a consistent result from those  
22 three claims on the verdict form.

23 MR. CAHR: I think we are fine with that.

24 MR. LINDVALL: Actually, the verdict form does  
25 exactly what we are talking about.

1 MR. CAHR: I think it does.

2 MR. LINDVALL: On Page 7 of our proposed verdict  
3 form.

4 THE COURT: Right. I think it needs some  
5 modification.

6 MR. CAHR: If we just got rid of that thing at  
7 the bottom and said if you answer yes to this, just go to  
8 the punitives, skip the whole discussion at the end with the  
9 unfair competition about being the same thing, that will  
10 avoid any confusion.

11 Basically, what we have is that -- Page 7.

12 THE COURT: Of the plaintiffs' proposal.

13 MR. CAHR: Basically just get rid of the whole  
14 discussion of unfair competition federal law, and basically  
15 have it set up so that if you find yes, you go to the  
16 punitive damages question.

17 THE COURT: Let's come back to that. For now,  
18 my plan is, on the instructions, at 8.0, I am going to tell  
19 the jury that the parties agree that their finding on unfair  
20 competition under state and federal law should follow what  
21 they find on the Lanham Act trade dress infringement.

22 MR. CAHR: Your Honor, to clarify, the trade  
23 dress under the federal law is the Lanham Act.

24 THE COURT: The trade dress is. But I  
25 understood there was a federal unfair competition claim as

1 well. Is that inaccurate?

2 MR. CAHR: I believe the federal unfair  
3 competition claim is the trade dress claim.

4 THE COURT: Is that correct, Mr. Lindvall?

5 MR. LINDVALL: I am getting confused.

6 MR. CAHR: Are there are any extra unfair  
7 competition allegations?

8 MR. LINDVALL: It's based on the Lanham Act.

9 THE COURT: So the full extent of the unfair  
10 competition claim under federal law is the trade dress  
11 infringement under the Lanham Act.

12 MR. CAHR: Yes.

13 THE COURT: All I need to say at 8.0 is that  
14 whatever you find on trade dress infringement -- and I could  
15 say, which is a federal claim for unfair competition, you  
16 should also -- the parties agree, you must also find the  
17 same way on the state unfair competition.

18 MR. CAHR: Yes.

19 MR. LINDVALL: That's fine, Your Honor.

20 THE COURT: And I don't need to mention Lanham  
21 Act or Section 43. Do you disagree, Mr. Lindvall?

22 MR. LINDVALL: I don't disagree.

23 MR. CAHR: I don't disagree.

24 THE COURT: All right. Bear with me a moment.

25 (Pause.)

1 THE COURT: All right. Next, at 9.0, this  
2 is where preemption comes up. I guess let me start with  
3 defendants. What authority would I look to to determine  
4 whether state proscription I suppose on patent infringement  
5 is preempted by federal law.

6 MR. KELLEHER: Your Honor, the Supreme Court  
7 Bonito Boats case comes to mind. As I stand here right now,  
8 that is the only Supreme Court case. There are other cases.

9 THE COURT: Do you know how to spell that?

10 MR. KELLEHER: B-o-n-i-t-o, pretty in Spanish,  
11 Boats.

12 THE COURT: Boats?

13 MR. KELLEHER: Yes.

14 THE COURT: All right. And you believe that  
15 holds that the whole patent area is, what, is preempted from  
16 state regulation?

17 MR. KELLEHER: My memory is that particular case  
18 found that federal patent law policy preempted the ability  
19 of states to regulate concerning inventions. I don't recall  
20 some of the facts of the case but that is my memory of the  
21 case.

22 THE COURT: Okay. That is where I would look  
23 then.

24 Mr. Lindvall.

25 MR. LINDVALL: Your Honor, we actually have a

1 couple cases that have gotten very close to this exact  
2 issue.

3 Since this is under California law, it says  
4 independently wrongful is unlawful under this if it's  
5 constitutional statutory, regulatory common law or other  
6 determinative legal standard.

7 Since the intentional interference has five  
8 elements, one of them is whether it's a wrongful act under a  
9 statutory, federal or state. That said, the preemption  
10 doesn't exist here because we're not looking at an overlap  
11 of elements. It just has to be a separate wrongful act, and  
12 that's the element itself.

13 I have some citations here for you. There is  
14 another one that says, for example, independently wrongful  
15 conduct include "actions which are independently actionable  
16 violations of federal or state law or unethical business  
17 practice, for example, unfounded litigation or trademark  
18 infringement."

19 THE COURT: Those are California authorities?

20 MR. LINDVALL: That is a Northern District  
21 of California case. And I have a Central District of  
22 California case.

23 THE COURT: So there is a number of authorities  
24 cited at the bottom of page 68 here.

25 Are the things you are relying on now among what

1 is cited there in footnote 3?

2 MR. LINDVALL: Is Korea Supply is one of them?

3 THE COURT: Right, that is listed here.

4 MR. LINDVALL: These are probably actually new  
5 ones we had done. Would you like me to give citations?

6 THE COURT: Tell me the citations.

7 MR. LINDVALL: Okay. The Theme Promotions v  
8 New, it would be, American Marketing. That is 546 F 3d 991.  
9 That is the Ninth Circuit 2008.

10 THE COURT: Okay.

11 MR. LINDVALL: I also have another citation.  
12 It's 2000. It's Biston Corporation. It's 2011 Westlaw  
13 1544796. That is at star 9; and that is the Northern  
14 District of California on April 25th, 2011.

15 And the last one I have is Marvel v NCSoft.  
16 Tell me if I am speaking too fast.

17 THE COURT: No, that's fine.

18 MR. LINDVALL: 2005 Westlaw 878090 at star 6.  
19 That is a Central District of California 2005. And that  
20 held that the copyright and trademark infringement are  
21 wrongful acts independent of the act of competition itself.

22 THE COURT: And what about Bonito Boats? Do you  
23 have any --

24 MR. LINDVALL: I don't have that. What I don't  
25 understand, preemption, I know probably more from law school



1       than anything else, that the presumption doctrine says the  
2       elements have to overlap regardless of what it is.

3               THE COURT:   Okay.

4               MR. LINDVALL:   I would be happy to provide the  
5       Court something if you would like.

6               THE COURT:   I may need that.   I will tell you in  
7       a second.

8               MR. LINDVALL:   Thank you.

9               THE COURT:   Mr. Kelleher, any thoughts?

10              MR. KELLEHER:   Only that I think the idea from  
11       the Bonito Boats case and perhaps its probably progeny is  
12       that it's field preemption.   That the Constitution gives to  
13       Congress the ability to regulate inventions and provide  
14       proper the proper rewards for it.   Under their theory, they  
15       can do the state tort to get extra damages for patent  
16       infringement, including punitive damages.

17              THE COURT:   And your view is it's settled that  
18       there is field preemption on the whole patent area?

19              MR. KELLEHER:   I think so, Your Honor.   Yes.

20              THE COURT:   All right.   Thank you.   Hold on a  
21       second.

22              (Court and law clerk confer.)

23              THE COURT:   All right.   Do you all want to put  
24       something in writing for me by tomorrow morning on this or  
25       would you rather we just do our best with what honestly

1 limited resources you have given us on this issue?

2 MR. LINDVALL: Maybe we should suggest for  
3 everybody's benefit like one page each, double spaced.

4 THE COURT: Large font.

5 MR. LINDVALL: Very large font.

6 THE COURT: Would you find it helpful to give  
7 me, let's say, up to two pages or would you rather I just  
8 struggle through the best I can?

9 MR. LINDVALL: We probably can help you, Your  
10 Honor. We'll give you two pages.

11 MR. KELLEHER: Two pages.

12 THE COURT: So let's say two pages per side,  
13 file it by 8:30 tomorrow morning.

14 MR. LINDVALL: That would be fine.

15 THE COURT: I will take a look at it.

16 MR. LINDVALL: Thank you, Your Honor.

17 THE COURT: And that is just on preemption.

18 MR. KELLEHER: (Nodding yes.)

19 THE COURT: All right. I'm next at page 86.

20 This is Damages For Trade Dress Infringement and Unfair  
21 Competition.

22 Basically, both sides have proposals here, and  
23 Broetje's argument seems to be that the plaintiffs' proposal  
24 gets into ideas that are not really at issue and I need not  
25 burden the jury with. Speak to that and do I understand

1       that is the dispute?

2                   MR. CAHR: Sure. Yes, Your Honor. In this  
3 case, injury or loss of plaintiffs' reputation, injury or  
4 loss of the plaintiffs' goodwill, including to the  
5 plaintiffs' general reputation. Those are not in their  
6 expert report. There is not any support for that, and they  
7 already had an interrogatory saying that all of their  
8 damages were supported solely by what is in their damages  
9 expert report. So those just aren't in the case and to have  
10 them there would just be confusing.

11                  THE COURT: So it's a correct statement of the  
12 law that you think is unnecessary?

13                  MR. CAHR: It's a correct statement of the law  
14 in total, but it's not what is relevant to this particular  
15 case.

16                  THE COURT: Okay.

17                  MR. CAHR: And corrective advertising also.

18                  THE COURT: Okay.

19                  MR. CAHR: Because there are three things  
20 they're just not seeking.

21                  THE COURT: All right. What is the plaintiffs'  
22 view? Why do I need to burden the jury with this  
23 complication?

24                  MR. LINDVALL: Your Honor, we got this out of  
25 the Ninth Circuit model, exactly like it is. These are

1 just factors they are to consider. They're not factors they  
2 have to get from an expert. They can get from testimony or  
3 anything else that they heard through the trial and weigh  
4 these and consider them.

5 THE COURT: Well, have you presented evidence  
6 about injury to your client's reputation?

7 MR. LINDVALL: I think you can argue there has  
8 been in our case-in-chief through that.

9 THE COURT: And the same with respect to  
10 goodwill? You think you have evidence from which you can  
11 argue there has been injury to your goodwill?

12 MR. LINDVALL: Yes, I believe we can make an  
13 argument on there.

14 THE COURT: And how about cost of corrective  
15 advertising?

16 MR. LINDVALL: No, Your Honor. I don't think we  
17 can make a case on that one. I agree we haven't had any  
18 evidence on that one.

19 THE COURT: Do you think I should tell the jury  
20 they can consider it?

21 MR. LINDVALL: You can take that one out.

22 THE COURT: All right. But the other four  
23 factors you think should remain in?

24 MR. LINDVALL: Yes, Your Honor.

25 THE COURT: All right. I'll give that some

1 further thought.

2 You can respond if you want.

3 MR. CAHR: Just to say I disagree about whether  
4 or not there is evidence on the first two factors. And in  
5 their Interrogatory No. 16 -- in our Interrogatory No. 16  
6 their response to it, AHG says that they respond -- and  
7 this interrogatory was the one asking for, identifying all  
8 monetary damages of AHG has suffered, specific cause of  
9 the damage or injury resulting in those damages, the method  
10 of calculating such damages, and all documents supporting  
11 the amount of monetary damages, the cause of that damage or  
12 injury.

13 And it says subject to their objections, AHG  
14 responds by incorporating by reference the damages expert  
15 report of Mr. Thomas Britven which was the predecessor to  
16 Mr. Ellis, served on July 28th, 2010. Actually, I think it  
17 should have been 2011.

18 So they basically just said that those are  
19 their damages, and to get into the other things, especially  
20 given the paucity of testimony on this before, would be  
21 prejudicial.

22 THE COURT: Just respond to the point that you  
23 have made this too late for you to, even if you have  
24 evidence of it, maybe it's too late for you to argue about  
25 damages.

1 MR. LINDVALL: Your Honor, I don't think that  
2 it is too late. I think it's just talking about the  
3 quantification of the damages, not necessarily the factors  
4 the jury should consider in awarding damages. Because  
5 they've heard the damages. They see what we're asking for:  
6 profits and unjust enrichment. Those numbers are going to  
7 be the same no matter what. That is what we disclosed to  
8 them, how those numbers came about. The factors to whether  
9 or not you get damages are contained in here.

10 THE COURT: All right. Let's talk about 11.3,  
11 Damages For Trade Dress Infringement, Monetary Compensation,  
12 Broetje's Profits. There is a competing construction, pages  
13 90 and 92. It seemed to me that the only difference was the  
14 plaintiff wants me to discuss that gross revenue is based  
15 on the sale of the entire automated rivet-feeding systems,  
16 including cassettes, rack, or loading stations where the  
17 defendants just want me just to talk about revenues from the  
18 rivet cassettes.

19 Mr. Lindvall, is that the nature of the dispute?  
20 And, if so, why should I tell the jury to factor in all of  
21 the entirety of the automated rivet-feeding systems?

22 MR. LINDVALL: Your Honor, we have cases on  
23 this. We've looked at this. And the situation here is in  
24 trade dress or trademark infringement, it's the ill gotten  
25 gains. When you look at the ill gotten gains, what they

1 would have sold or not sold here.

2 And here, if we don't -- because of their  
3 infringement, we missed out on the sale of the whole system.  
4 You probably heard lots and lots of systems that these  
5 operate as a functional unit. If you miss you out on one  
6 sale, you miss out on a sale of a loading station, the rack,  
7 and the cassette sales. Just like you have convoyed sales  
8 and lost profits in the patent arena, it's the same  
9 situation here.

10 I believe we have a couple cases we have  
11 recently seen. One is, for example, Nintendo v Dragon,  
12 which is 40 F3d 1007, Ninth Circuit. And in that case, the  
13 Court didn't require damages to be apportioned where  
14 defendant's product, which is video game cartridges,  
15 partially contain the copyright Nintendo video games. It's  
16 the exact same situation here where the Court allowed  
17 damages of the whole product, on the whole system.

18 THE COURT: Is there any evidence that your  
19 trade dress is allegedly misused in connection with the  
20 racks or the loading stations?

21 MR. LINDVALL: Well, the trade dress we're  
22 obviously arguing is on a cassette. But you see what  
23 happens. You can't, you can't parcel this out. Once we  
24 lose it on the cassette, once you have got the infringement  
25 on the cassette, then everybody buys the whole system. So

1       once they copied the cassette.

2               THE COURT:   Hasn't the evidence been that people  
3       were buying the system from Broetje before?   When it was  
4       your cassette, they were still buying the racks and the  
5       loading stations.

6               MR. LINDVALL:   No, Your Honor.   Absolutely not.

7               THE COURT:   No?

8               MR. LINDVALL:   They made the cassette first and  
9       they were continuing to use the AHG racks and loading  
10       stations until a number of years later.   Broetje did not  
11       even begin to make racks or loading stations until well in  
12       2005, 2006.

13              THE COURT:   Okay.   Thank you.   I'll hear from  
14       defendants.

15              MR. CAHR:   First of all, there is, as far as we  
16       can find, no cases at all saying that convoyed damages are  
17       appropriate in a trade dress case.   Literally, we were  
18       unable to find any.

19              THE COURT:   Have you heard of this Nintendo  
20       case?

21              MR. CAHR:   I had not heard of that.   I don't  
22       believe -- is that a trade dress case?

23              MR. LINDVALL:   I believe it's a copyright case.

24              MR. CAHR:   See, copyright is completely  
25       different than trade dress and trademark law, and there



1 are -- we were unable to identify a single trademark or  
2 trade dress case where conveyed damages were applied, and  
3 there is a reason for that. Exactly what you pointed out.  
4 If there is no trademark on the rack, no trademark on the  
5 loading station or trade dress on the loading station or  
6 trade dress on the rack, then it's defeating the whole point  
7 of why you're protecting the trademark.

8 And I think your question to Mr. Lindvall was  
9 were we selling racks and loading stations before when we  
10 were actually working together? And we were. We were  
11 selling AHG racks and AHG loading stations when we were  
12 selling AHG cassettes. And then we were selling AHG racks  
13 and AHG loading stations with Broetje cassettes. And then  
14 later we were selling Broetje cassettes with Broetje racks  
15 and Broetje loadings stations. It just sort of defeats the  
16 whole argument.

17 THE COURT: All right.

18 MR. LINDVALL: I have one more citation counsel  
19 just brought to me.

20 THE COURT: Okay.

21 MR. LINDVALL: Which is this Roulo, R-o-u-l-o, v  
22 Rustbury, and it's 866 F2d 931. And the pinpoint cites are  
23 941 through 942. That is a Seventh Circuit decision 1989.

24 Keep in your mind the statute itself says the  
25 revenue that the defendant loses as a result of the

1 infringement. And the revenue we've lost in the Lanham Act,  
2 the Lanham Act statute, says the revenue we lost is the  
3 revenue for the system. You can't part and parcel. In  
4 other words, we didn't keep on selling racks and loading  
5 stations forever to Broetje. If that was true, it would  
6 just be the cassettes then.

7 THE COURT: Mr. Cahr represents that he has  
8 never seen a case where this convoyed sales argument was  
9 accepted in a trade dress context. If I read these two  
10 cases you just cited and the other authorities you have  
11 cited at 11.3A, am I going to find he is wrong about that.

12 MR. LINDVALL: It won't say convoyed. In fact,  
13 what Mr. Cahr will say also -- he is not going to find a  
14 case the other way around, either.

15 In this area of the law, the concept of convoyed  
16 sales doesn't exist. It's not like a patent case where you  
17 have convoyed sales and lost profits.

18 THE COURT: Do they call it something else?

19 MR. LINDVALL: No. They look at the damages and  
20 the system and say what is the damage to the plaintiffs in  
21 this situation? What is the plaintiffs' lost revenue?

22 For example, if it's Coca-Cola and someone is  
23 knocking off the Coca-Cola bottle and they make revenue from  
24 that, they say they get revenue for all the sales of the  
25 Coca-Cola bottle.

1 THE COURT: How do you fit it into the facts  
2 here, which I understand I misstated earlier, but we do have  
3 time frames in which Broetje was selling all three pieces  
4 that were yours that went into a larger system, where they  
5 did other parts of it, and then at times they were selling  
6 just one part that you provided, and then other times  
7 ultimately they provided no parts that you provided and you  
8 have only provided evidence that you have your trade dress  
9 on the one part, the cassette?

10 So with all that, how could a jury find that all  
11 of the lost sales for all of the components were due to  
12 trade dress infringement just at the cassette level?

13 MR. LINDVALL: Because once they have copied the  
14 cassette, that leads them to copy the whole system. Now we  
15 have lost the whole system, the sale of the whole system, as  
16 a result of that wrongful act with the cassette. If they  
17 continued buying racks and loading stations from us, we  
18 would have no problem with that. It would just be the lost  
19 sales off the cassette. But they didn't.

20 We lost the system. There is lots of testimony  
21 saying these all act as one functional unit and because they  
22 act as one functional unit we lost the sale of that whole  
23 system as a result of the wrongful acts, in other words,  
24 what they copied.

25 MR. CAHR: I would just add that the two cases

1 that are probably most relevant to the way the Third Circuit  
2 looks at product configuration trade dress and damages in  
3 general for trademark cases would be, the controlling case,  
4 as they have cited, is Banjo Buddies v. Renowsky, which is  
5 399 F.3d 168, which has the specific test of equitable  
6 tests, which you are to undergo, that is the Court, to  
7 determine whether or not these damages are appropriate in  
8 general. Then the Versa Products case, which actually talks  
9 specifically about the distinctions between how you think  
10 about harm, really, in the larger sense, in a trade dress  
11 case, when you are dealing with product configuration.

12 Product configuration is very different, as you  
13 have noted just now, than really any other kind of trademark  
14 case, let alone other kinds of intellectual property.

15 If you actually say in a trade dress case that  
16 the trade dress of the cassette allows you to effectively  
17 monopolize all of these other things which have none of the  
18 non-functional distinctive elements that you have to have in  
19 order to have trade dress, you are effectively granting a  
20 permanent monopoly to things that are functional items that  
21 are reserved in the patent law.

22 The Versa Products case --

23 THE COURT: That is also Third Circuit?

24 MR. CAHR: Yes. Has been affirmed as still good  
25 law. It's still good law in the Third Circuit. A&R

1 Sportswear versus Victoria's Secret.

2 The Versa Products case is considered to be the  
3 leading case on these types of product configuration issues  
4 and has been cited by appellate courts around the country.

5 THE COURT: We will take a look at the  
6 authorities that you have all cited and figure that one out.

7 Next, at 11.4, the plaintiffs have a proposal.  
8 I am not sure if the defendants object to it. It relates to  
9 damages and intentional infringement. Is that objected to?

10 MR. CAHR: No, Your Honor.

11 THE COURT: Okay.

12 All right. On the back end here, there is a lot  
13 of disagreement about dates and statute of limitations. It  
14 seemed like that was maybe the same dispute multiple times.  
15 Help me understand what I need to decide about what I need  
16 to tell the jury about the dates and the statute of  
17 limitations.

18 MR. LINDVALL: Your Honor, the first thing is  
19 that California recognizes the continuous accrual doctrine,  
20 which means for every act of infringement there is a  
21 separate cause of action.

22 So that starts the statute over again. As a  
23 result of that instruction, as we see, our instruction is  
24 very close to theirs, but ours says, it's for each time. So  
25 if you see -- I am trying to look --

1           THE COURT: For instance, Page 99 was the first  
2 place I see it come up. Statute of limitation, trade dress  
3 infringement.

4           MR. LINDVALL: Right, we say each of AHG's  
5 claims harms. Broetje says a claim harms. So Broetje is  
6 taking the position that there is no continuous accrual  
7 doctrine or it shouldn't be applied and there is only one  
8 harm that has occurred. And we are saying every time you  
9 have an act of trade dress infringement that starts the  
10 statute over again. That is the proper statute of  
11 limitations under California law, because California law has  
12 a number of common law exceptions and we cite a case there,  
13 and this is one that they use.

14           THE COURT: Do you disagree?

15           MR. CAHR: We disagree on how this works when  
16 you have got a continuing tort. They are basically saying  
17 it restarts it. We are saying it just moves the framework.  
18 This may be an issue where it might be useful for the  
19 parties to provide a paragraph or two, just describing the  
20 relevant cases. Because this is something where -- it is  
21 fairly intricate. I don't know that we will get much help  
22 to you just going back and forth like this.

23           THE COURT: If I understand the plaintiffs'  
24 position, it is that the first act, let's say, of  
25 infringement, that is January 1st, 2005. Say the statute is

1 three years. If they sue after January 1st, 2008, they are  
2 out of luck on that first act of infringement. They can't  
3 recover damages or accrued liability for that.

4 But if there has been another act, January 1st,  
5 2006, and their suit is within three years of that, then  
6 they are fine on that second one. They just can't get back  
7 the first one.

8 MR. LINDVALL: That's correct, Your Honor.

9 THE COURT: Do you disagree with that?

10 MR. CAHR: That is correct. But that's not how  
11 I understood Mr. Lindvall's description. It's a sliding  
12 window that moves. It's not something that sort of restarts  
13 the whole process over again.

14 THE COURT: You agree with that, Mr. Lindvall.  
15 Right?

16 MR. LINDVALL: Right, because there were  
17 multiple acts of infringement here, you have got to look at  
18 each act, because there are two. You had two instances. If  
19 you took 20 acts during the course of time, you go there and  
20 add --

21 THE COURT: But you don't go back to the  
22 beginning of the three-year period.

23 MR. LINDVALL: Yes, Your Honor.

24 MR. CAHR: We just disagree about the dates.

25 THE COURT: So we disagree conceptually. Your

1 belief, Mr. Lindvall, if we adopt your language, we will  
2 capture what we all agree is the California law.

3 MR. LINDVALL: Agree, Your Honor.

4 THE COURT: What about the dates? There are  
5 apparently disagreements about what actual dates I should be  
6 telling the jury. What do I need to know about that?

7 MS. BEYER: Your Honor, one issue relating to  
8 the priority language, AHG's proposal that the infringing  
9 parties must prove that each of AHG's harms occurred before  
10 May 12th, 2006. I think it has the possibility of being  
11 misleading to the jury and that they would misunderstand  
12 that it is restarting the clock, as opposed to a sliding  
13 window we are talking about.

14 I think if we move -- we need to wordsmith that  
15 a bit and move each of AHG's harms in the sentence.

16 THE COURT: How long is the statute of  
17 limitations?

18 MR. CAHR: It varies.

19 MS. BEYER: Three years.

20 MR. CAHR: Three years for federal. Two years  
21 for state.

22 THE COURT: Do you agree with that, plaintiff?  
23 Three years federal, two years state is the length of the  
24 statute of limitations?

25 MR. LINDVALL: Your Honor, to be honest with



1       you, I can't answer that right now.

2               THE COURT: We will work on the language and do  
3       our best to convey what California law is on the continuous  
4       accrual.

5               But in terms of what actual dates we should be  
6       telling the jury, maybe we should go one by one. At 11.6,  
7       everyone is in agreement, May 12, 2006 is the date I should  
8       be telling them. Correct?

9               MR. LINDVALL: Yes, Your Honor.

10              MR. CAHR: Yes, Your Honor.

11              THE COURT: Then at 11.7, Page 101, we are all  
12       in agreement, May 12th, 2006 again.

13              MR. LINDVALL: Yes, Your Honor.

14              MR. CAHR: Yes, Your Honor.

15              THE COURT: 11.8, you propose different dates.  
16       Let's talk about that.

17              Mr. Lindvall, it looks like plaintiffs propose  
18       May 12th, 2005 and Broetje proposes May 12, 2007. What's  
19       going on there?

20              MR. CAHR: Your Honor, this relates to the  
21       difference in how you apply the statute of limitations. If  
22       it is a California state common law state unfair competition  
23       claim, it is under 7-200, the infamous California statute on  
24       unfair competition. That one has a four-year statute of  
25       limitation. It is a two-year statute of limitation for

1 common law unfair competition. In fact, we have extensive  
2 case law on this issue.

3 A number of courts have decided this exact  
4 issue. We would be happy to provide that to you.

5 THE COURT: Your view is it should only be two  
6 years.

7 MR. CAHR: Yes, it should only be two years.

8 MR. LINDVALL: That kind of rings a bell.

9 There is a California statute that says four  
10 years for unfair competition. And we can provide that  
11 citation for you, along with theirs. California, I have to  
12 be honest with you, in this area, it's kind of confusing.  
13 There is a two-year and a four-year. Four year is a  
14 statutory statute of limitations.

15 THE COURT: Here is what we will do. I am  
16 expanding your two pages to three pages. Address this 11.8  
17 dispute as well, the two years versus four years. So get  
18 that to us by 8:30 tomorrow morning, the previous issue we  
19 talked about, as well as this one we were just talking about  
20 now.

21 Then my final thing on jury instructions, at  
22 11.13B, No Duplicative Damages - Nonpatent Damages, you both  
23 have proposals on this. One of the differences, maybe the  
24 only difference was whereas Broetje had sort of an  
25 introductory couple sentences at the beginning of 11.13B,

1 the top of Page 113, which would have me tell the jury, AHG  
2 seeks damages from the Broetje parties under more than one  
3 legal theory. However, each item of damages may be awarded  
4 only once regardless of the number of legal theories  
5 alleged.

6 My question to Broetje is, punitive damages, are  
7 they available on more than one claim here? If they are,  
8 this may be a little misleading.

9 MR. CAHR: They are available under state law  
10 unfair competition and under intentional interference.

11 THE COURT: Then if I were inclined to use your  
12 introduction here, would you object to me modifying it,  
13 However, other than punitive damages --

14 MR. CAHR: How about AHG's compensatory damages,  
15 to distinguish it from the punitive damages.

16 THE COURT: So we are only talking about  
17 compensatory damages here.

18 MR. CAHR: Yes.

19 THE COURT: I am not trying to tell them they  
20 can't award punitive damages more than once.

21 MR. CAHR: We have no objection.

22 MR. LINDVALL: In ours, we actually have that  
23 kind of language.

24 THE COURT: I will do something with that to  
25 make that clear.

1           Before getting to the verdict sheet, were there  
2   jury instruction disputes anyone else wanted me to focus on  
3   that we haven't talked about? I thought I could resolve it.  
4   But if you want to make it more confusing, go ahead.

5           MR. LINDVALL: They have one instruction, 4.6  
6   called product Design-Around, which doesn't come from any  
7   model or anything else. I believe that it's an improper  
8   instruction. It's not really an instruction of law, because  
9   it's just -- that's one of the factors that they consider.  
10   To take it out and put it by itself is improper.

11          THE COURT: You object to that?

12          MR. LINDVALL: Yes, Your Honor.

13          THE COURT: Any others you want to touch on?

14          MR. LINDVALL: The only other ones where we have  
15   competing ones, all we have done, we have cited to Your  
16   Honor's earlier ones. I think they may have changed up. We  
17   would just say we would request that you leave them as  
18   before. I don't see any others that come up to me that look  
19   troublesome at all.

20          THE COURT: Okay. Any for Broetje, if you want  
21   to respond on the design-around and/or raise another issues,  
22   you can.

23          MR. KELLEHER: It's a proper statement of a  
24   federal policy, Your Honor. There are cases that support  
25   that proposition and certainly that is the facts of the

1 case.

2 THE COURT: I think my concern is calling out  
3 the policy on design-around, when there are certainly  
4 policies underlying almost every instruction, and I am  
5 definitely not getting into them. Is there that need to  
6 call out the policy underlying design-around?

7 MR. KELLEHER: I think where there is  
8 accusations of copying, when there are actually differences  
9 between the products, then letting the jury know that  
10 federal law encourages people to actually make differences  
11 when they are making a similar product, that that would fit  
12 the facts of the case and help the jury.

13 THE COURT: Any others you want to touch on?

14 MR. CAHR: Just a couple, Your Honor. On 5.0,  
15 willful Infringement, we object to this in its entirety  
16 because our position is that it's the Court's decision. And  
17 if the Court chooses to reserve its decision until after the  
18 jury deliberates, we will accept it.

19 THE COURT: Right. I intend to get the jury's  
20 view. But your rights are certainly preserved there. I  
21 understand what the law is.

22 Any others you want to touch on?

23 MS. SHARP: Your Honor, there was discussion  
24 about the Versa Products and Nintendo issue. May we add one  
25 page for the submission on that issue?

1 THE COURT: Make it four pages?

2 MS. SHARP: Yes.

3 THE COURT: Any objection to that?

4 MR. CAHR: No, Your Honor.

5 THE COURT: We will take four-page letters. But  
6 we are not going any longer than that.

7 Other issues from defendants?

8 MR. CAHR: No, Your Honor.

9 THE COURT: Okay. Let's talk briefly about the  
10 verdict sheet disputes. I guess first, to plaintiff,  
11 shouldn't I, for the claims that have a scienter element,  
12 break it out as between the two different defendants? That  
13 is sort of an overriding theme on a number of the claims.

14 MR. LINDVALL: Your Honor, we would have no  
15 problem with that. Our goal was to try to make it simple.  
16 This is tough. Ours is nine pages. Theirs is 16. We are  
17 trying to simplify it. I have no problem.

18 THE COURT: We will be doing that. Willful  
19 Infringement, I already noted I will be asking the jury  
20 about that.

21 Mr. Lindvall, on invalidity, the question is,  
22 should I break out anticipation and obviousness? Is it just  
23 the simplicity concern, or is there something else?

24 MR. LINDVALL: I think it is simplicity. They  
25 are primarily relying on from seeing the slides is

1 anticipation.

2 THE COURT: You are not dropping obviousness,  
3 are you?

4 MR. KELLEHER: We are not, Your Honor.

5 THE COURT: I am going to split it out. It will  
6 make it easier for any further proceedings in this case or  
7 any other court for us to know whether the jury thought the  
8 patents, if they do, were invalid due to obviousness or  
9 anticipation.

10 I guess to defendants, there is a couple of  
11 these where you want me to have the jury walk step by step  
12 through all of the elements of certain defenses and actually  
13 make certain affirmative elements of some of the claims.  
14 That does seem unduly confusing, given they will have the  
15 jury instructions and we are not doing that, for instance,  
16 on invalidity, we are not telling them to walk through each  
17 and every limitation, for instance.

18 But maybe there is something I am not seeing  
19 there. Why should I entertain the possibility of all of  
20 those questions you have broken out for us?

21 MR. CAHR: I am assuming you are talking about  
22 the trade dress infringement?

23 THE COURT: It comes up at least there.

24 MR. CAHR: In the trade dress context, there are  
25 independent determinations that need to be made. And for

1 ease of the Court, in the JMOL process and also for ease of  
2 review on appeal, I think given the fact there are these  
3 independent considerations, like the functionality element,  
4 which is, in a product configuration trade dress case, as  
5 you will see in the Versa Products case, is overwhelmingly  
6 important.

7 I think that it will just be incredibly helpful  
8 to the Court and incredibly helpful to a reviewing Court if  
9 they have that information.

10 THE COURT: All right. Do you want to respond?

11 MR. LINDVALL: Your Honor, I think it would be  
12 actually extremely confusing to the jury because you are  
13 taking your instruction basically on trade dress and  
14 breaking it down, element by element: Your Honor's  
15 example, for example, obviousness or trademark. I mean  
16 patent infringement, that is like breaking it down element  
17 by element and going through that way.

18 Your instructions should be clear on that. You  
19 are basically taking your instructions and listing them all  
20 out in the area. This verdict form I think is confusing  
21 enough as it is. And if you enter that in there, we are  
22 just inviting problems coming in and out of that. And to  
23 ask them a simple question like this would be a lot easier  
24 for them and, in light of the instructions you give them,  
25 would be fine.



1 THE COURT: Okay. Is there anything further on  
2 that, Mr. Cahr?

3 MR. CAHR: No, Your Honor. I mean I just think  
4 that given the fact the product configuration trade dress is  
5 so unusual relative to even trade dress law normally that I  
6 think that it will just be helpful to the jury.

7 THE COURT: All right. I will give that some  
8 more thought.

9 One quick question on damages. At least the  
10 plaintiff and maybe the defendant, too, is asking the jury  
11 to separately find an amount of patent damages for each of  
12 the two patents.

13 So, for instance, I'm looking at page 6 of the  
14 plaintiffs' proposal which would have them separately  
15 provide a damages number for the '339 and the '216.

16 MR. LINDVALL: That part, our intent is not to  
17 ask for separate damages for each patent. I agree there  
18 should be one damages number for the infringement of these  
19 patents. But I think what the problem is here, what happens  
20 if they find one patent invalid and infringed?

21 THE COURT: Right.

22 MR. LINDVALL: You get into that issue. So  
23 I'm not sure. That's why we split it out. But we're not  
24 looking for a double recovery.

25 THE COURT: Right.

1 MR. CAHR: Your Honor, there is also a notice  
2 issue for one of the patents, and so there is some  
3 difference in that regard as well. And I mean I presume  
4 that some things could be addressed with remittitur, if need  
5 be, but I think having them separate is probably easier.

6 THE COURT: And I am trying to find what the  
7 defendants proposed.

8 Are you comfortable with what the plaintiffs  
9 have proposed at page 6 of their proposal as of yesterday,  
10 questions 10A and 10B?

11 MR. LINDVALL: Your Honor, I just overheard  
12 Ms. Sharp's suggestion that maybe you can have an  
13 introductory thing: If you find infringement and the patent  
14 valid for either of the patents, then you award X.

15 THE COURT: Right. Because there certainly has  
16 not been -- I know you don't want a double recovery. The  
17 law wouldn't allow that.

18 MR. LINDVALL: Yes.

19 THE COURT: But there has been no evidence as to  
20 how patent damages are broken down between the two patents.

21 MR. LINDVALL: No.

22 THE COURT: So you don't want to ask the jury to  
23 do that either.

24 It seems to me, unless I go with the defendants'  
25 proposal which has a number of other hurdles, what I should

1 try to do is rewrite Question 10 as proposed by the  
2 plaintiffs to make it clear you come to the patent damages  
3 question either through a finding of infringement and no  
4 invalidity on the claim of the '339 and/or of the '216.

5 MR. LINDVALL: And then there is one line, you  
6 can put in a number.

7 THE COURT: Right. The '339 and '216; is that  
8 right?

9 MR. LINDVALL: Yes.

10 THE COURT: That is what I'm going to try to do.

11 Are there any other issues about the verdict  
12 sheet that I haven't brought up that anybody wants to raise?

13 MR. CAHR: Your Honor, on the last one, hold on  
14 one moment.

15 THE COURT: Sure.

16 MR. CAHR: We're fine with that as long as we  
17 still have the separate issue, the separate instruction on  
18 the actual notice.

19 THE COURT: The separate instruction and/or  
20 separate question.

21 MR. CAHR: Separate subparts.

22 THE COURT: Right. And that is a separate issue  
23 which I am going to give more thought to, but at least if I  
24 do choose to go with the plaintiffs on the larger question,  
25 I'm going to still rewrite what the plaintiffs have proposed

1 along the lines of what I have said but I haven't made a  
2 final decision. Maybe I will just go with what the  
3 defendants have proposed.

4 Do either side have other issues on the verdict  
5 sheet that we should talk about?

6 MR. CAHR: I don't think so, Your Honor. I  
7 think most of them are substantive disputes over who should  
8 win.

9 THE COURT: Right. Okay.

10 MR. LINDVALL: The only thing I can -- with  
11 respect to their instructions on the statute of limitations,  
12 and they have on page 14 of their proposed instructions.  
13 They have the instruction: Did AHG discover or know of  
14 facts that would have caused a reasonable person to suspect  
15 ...

16 If Your Honor is going to be deciding the  
17 equitable tolling issue and not have the jury decide it, it  
18 may be even more, make more sense, and the Judge can decide.  
19 Your Honor can decide that.

20 THE COURT: Well, you are all in agreement I'm  
21 not giving the jury equitable tolling; right?

22 MR. LINDVALL: Yes, I think they have had  
23 enough. That is why I am taking it off.

24 THE COURT: And you don't want anything  
25 regarding statute of limitations to be asked of this jury?

1 MR. LINDVALL: Yes, I prefer not to. It's  
2 trying to simplify it for them.

3 THE COURT: Right.

4 MR. LINDVALL: I think it's something Your Honor  
5 could deal with.

6 MR. CAHR: I think it's important to have a  
7 finding of fact on these issues. The jury has heard all of  
8 this evidence. I think it would be helpful to Your Honor to  
9 hear from them. Obviously, it's within your ability to make  
10 all of the alterations relative to it, but I think that as a  
11 fact-finding that it will be helpful to you.

12 THE COURT: Well, I understand that is the  
13 parties' positions and we'll give that some more thought.

14 Is there anything else on the verdict sheet?

15 MR. LINDVALL: No, Your Honor.

16 THE COURT: All right. So here is where we are.  
17 We'll finish the evidence tomorrow. Be available at 8:30.  
18 Get your letters in at 8:30, and I'll see you as soon after  
19 8:30 as I can.

20 My intent is that we'll finish the evidence  
21 tomorrow, and my further intent is that I will have the  
22 instructions done such that I can read to the jury through  
23 section, I think it's 12, basically everything but the  
24 deliberation portion. That's going to take me about an  
25 hour. I'll get that out of the way some time tomorrow.

1                   Then when we come in on Friday, whatever time  
2                   that is, we'll start with the closing arguments which I  
3                   understand won't exceed two and-a-half hours altogether.  
4                   And I will read that last little bit of jury instructions.  
5                   I'll read the verdict sheet to them. And then they'll  
6                   deliberate however long they wish to deliberate.

7                   So to make that all work, that means I have to  
8                   get the jury instructions finished and docketed some time  
9                   before I sit down to read them tomorrow afternoon, which  
10                  we'll do, and it means we have to have the verdict sheet  
11                  done by Friday morning, which we will make sure we do as  
12                  well.

13                  Is there any questions or anything else,  
14                  Mr. Lindvall?

15                  MR. LINDVALL: No, Your Honor.

16                  MR. CAHR: Just one quick thing.

17                  THE COURT: Yes.

18                  MR. CAHR: We actually have a deadline at 7:00  
19                  for our demonstratives. Can we extend that out a little  
20                  bit?

21                  THE COURT: Certainly I would be agreeable to  
22                  extending it.

23                  Is there any objection?

24                  MR. LINDVALL: No, I don't have any objection.

25                  MR. CAHR: So if we can have until 8:00.

1 MR. LINDVALL: That's fine.

2 THE COURT: 8:00 o'clock, that's fine.

3 MR. LINDVALL: We would have agreed to that on  
4 our own.

5 THE COURT: All right. Mr. Kelleher.

6 MR. KELLEHER: Since you have a matter here  
7 tomorrow morning, is it all right to leave the exhibits in  
8 the well of the court or should we move things around for  
9 you?

10 THE COURT: That's a really good question. I  
11 think it would be better if you could clear that area. So  
12 if you could stick around for a couple minutes and do that,  
13 that will help. Thank you.

14 MR. LINDVALL: And leave that stuff?

15 THE COURT: I think that will be fine back  
16 there.

17 Thank you very much. Have a good night.

18 (Proceedings adjourn at 5:44 p.m.)

19

20 I hereby certify the foregoing is a true and accurate  
21 transcript from my stenographic notes in the proceeding.

22

23 /s/ Brian P. Gaffigan  
24 Official Court Reporter  
25 U.S. District Court